

United States
Circuit Court of Appeals

For the Ninth Circuit.

Vol
2296

MONARCH BREWING COMPANY, a corpo-
ration,

Appellant,

VS.

GEORGE J. MEYER MANUFACTURING COM-
PANY, a corporation,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the
United States for the Southern District
of California, Central Division.

FILED

APR - 7 1942

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

ALFRED F. MacDONALD, Esq.,
MESSRS. BODKIN, BRESLIN & LUDDY,
G. STUART SILLIMAN, Esq.,
1225 Citizens National Bank Building,
Los Angeles, California.

For Appellee:

MESSRS. LAWLER, FELIX & HALL,
MAX FELIX, Esq.,
WILLIAM T. COFFIN, Esq.,
800 Standard Oil Building,
Los Angeles, California. [1*]

*Page numbering appearing at foot of page of original certified Transcript of Record

In the Superior Court of the State of California
in and for the County of Los Angeles

No. 452-304

MONARCH BREWING COMPANY, a corporation,

Plaintiff,

vs.

GEO. J. MEYER MANUFACTURING CO., a corporation,

Defendant.

COMPLAINT—DAMAGES FOR BREACH
OF WARRANTY.

Comes now the above named plaintiff and complaining of the above named defendant for cause of action alleges as follows:

I.

That plaintiff, Monarch Brewing Company is now and at all times herein mentioned has been a corporation duly organized and existing under and by virtue of the laws of the state of California and having for its principal place of business the city of Los Angeles, county of Los Angeles, state of California.

II.

That plaintiff is informed and believes, and upon such information and belief alleges that defendant, Geo. J. Meyer Manufacturing Company is now and

at all times herein mentioned has been a corporation duly organized and existing under and by virtue of the laws of the state of Wisconsin and having for its principal place of business [2] the City of Cudahy, State of Wisconsin; that at all times herein mentioned defendant has been and now is a foreign corporation transacting intrastate business in the State of California.

III.

That heretofore, to wit, on or about the 14th day of February 1938, plaintiff and defendant entered into an agreement in writing wherein plaintiff agreed to purchase from defendant and defendant agreed to sell to plaintiff the following described machinery:

- 1 #516 Qt. Meyer Dumore Bottle Cleaner complete with motor and continuous soaker drive
1840 bottles immersed
- 1 40 valve Meyer Dumore Filler
- 1 #1050 Meyer Cataract Pasteurizer
Necessary Bottle Conveyor

For the total purchase price of \$52,700.00, payable \$3,500.00 down payment and the balance as particularly set forth in said contract of sale; that a full, true and correct copy of said contract is attached hereto, marked exhibit "A", incorporated herein and made a part hereof, the same as though said contract was set forth fully and at length in this paragraph.

IV.

That plaintiff at all times herein mentioned has been and now is engaged in the business of brewing, bottling and selling beer, and it was plaintiff's purpose in entering into the agreement for the purchase of the machinery hereinbefore described, to use said machinery for the purpose of bottling and pasteurizing the beer manufactured by plaintiff; all of which defendant had knowledge at the time of the execution of the agreement aforesaid, and with such knowledge, defendant represented that the machinery hereinbefore described, would accomplish in conformity with plaintiff's purpose, and with such knowledge, defendant recommended to plaintiff the purchase of said machinery.

That at the time of the execution of the aforesaid contract of sale by the parties thereto, plaintiff had no knowledge whatsoever [3] of the quality and fitness of said machinery to perform the work and services required by plaintiff; that at the time of the execution of said agreement, defendant assumed to have knowledge, and, through its agents, stated and represented to plaintiff that said machinery would, in a satisfactory manner, perform and do all of the things which plaintiff desired to have done and performed, by reason of the purchase of said machinery.

V.

That at the time of the execution of the agreement aforesaid, defendant did, in said agreement,

warrant and guarantee the proper working of the said machinery under reasonable operation thereof, according to defendant's instructions.

That at the time of purchase of said machinery, plaintiff relied solely upon the warranty aforesaid, and the superior knowledge which defendant assumed to have, concerning the quality and fitness of said machinery to do the work required by plaintiff:

That plaintiff would not have entered into said contract for the purchase of said machinery had it known (as hereinafter alleged) that said machinery would not do and perform the work as warranted by the defendant.

VI.

That after the execution of the aforesaid agreement in writing and on or about the 6th day of December 1938 said contract in writing was changed and modified by the parties thereto in reference only to the time and manner of payments agreed to be made by plaintiff to defendant on account of the purchase price of said machinery; that at said time, except as in the particulars hereinbefore stated, the original contract in writing dated February 14th 1938, being exhibit "A" attached hereto, was reaffirmed and all of the terms and conditions thereof again agreed upon by said parties, and defendant did again warrant and guarantee to plaintiff the proper working of the machinery under reasonable operation thereof according to the defend- [4] ant's instructions.

VII.

That defendant shipped said machinery to plaintiff on or about April 27th 1938, and, pursuant to the terms and conditions of the contract dated February 14th, 1938, defendant furnished an engineer to supervise the installation and erection of said machinery in plaintiff's brewery plant.

That ever since such installation and erection, said machinery has failed to work properly, though operated reasonably and according to defendant's instructions.

That from May 6th 1938 to July 9th 1938, defendant's agents and employees consumed a period of some 313 hours in attempting to make said machinery work properly in accordance with defendant's warranty. That defendant continuously, from time to time, during the period from July 9th 1938 to March 20, 1940, notified and complained to defendant that said machinery was not working properly although plaintiff operated same reasonably and according to defendant's instructions.

That ever since the installation and erection of said machinery defendant has assured plaintiff that said machinery would eventually work properly, and from about the 9th day of July 1938 to the present time, has caused its agents and employees, without charge or expense to plaintiff, to endeavor to fix and adjust said machinery so that it would comply with the warranty made by defendant to plaintiff, as set forth in said written contract, that during

said period of time defendant's agents and employees have worked for a period of 405 hours in an endeavor to make said machinery comply with said warranty.

That plaintiff relied upon the assurances of the defendant that said machinery would eventually be made to work properly in compliance with defendant's warranty and did not bring suit for breach of said warranty by reason of said reliance.

That plaintiff has performed all the matters and things agreed by it to be performed under its contracts with defendant. [5]

VIII.

That ever since the installation of said machinery and almost daily, various parts thereof broke, and became out of adjustment, thereby causing shut-downs in the operation of said machinery, lasting anywhere from one half to three hours for each shut-down; that by reason of the breach of defendant's warranty, plaintiff has thereby been damaged in the sum of \$50,000.00 no part of which sum has been paid.

Wherefore plaintiff prays judgment against said defendant for the sum of \$50,000.00, damages, for breach of warranty; Plaintiff's costs and disbursements of this suit and for such other and further relief as may be meet and proper.

ALFRED F. MacDONALD,
Attorney for Plaintiff.

CONTRACT

ORIGINAL—Seller-Office
NOTE: Do not write on this copy after
it is signed.

County _____ State _____ Date 1938 _____
Geo. J. Meyer Manufacturing Co., a Corporation, Cudahy, Wis., (Seller) SHIP as follows:
(Suburb of Milwaukee)

on or about subject to delays beyond your control
(BUYER)

Street _____ City _____ via _____
ONLY THE GOODS AS SPECIFIED IN DETAIL BELOW—F.O.B. CARS FACTORY CUDAHY
VERBAL UNDERSTANDINGS ARE NOT BINDING UNLESS SPECIFIED IN THIS CONTRACT

LIST PRICE OF ALL ITEMS
ORDERED

Cars Factory Cudahy	Add Freight \$	Add Placing \$	Total \$
Bottle Conveyor @ \$12.00 / ft	Angle Brkts @ \$75	Drives @ \$150	

years from date of shipment, which in Seller's opinion are defective or worn out through normal use. Seller shall not be liable for delays, damages or consequential damages, in shipment, erection, or in operation of above goods. This guarantee does not apply to brushes, brush tubes, electrical equipment, gauges, instruments or procurable commercial parts.

BUYER to furnish sample bottles, foundations, openings in building, place machines and connect steam, water and electric lines to headers and all labor required and pay costs if engineers are detained or recalled through Buyer's fault.

Seller (~~will~~) furnish engineer to supervise erection and service total _____ hours.
Traded-in machinery, including all parts, to be removed, stored and loaded in cars by Buyer. Discount forfeited if payments defaulted.

~~Nothing binding anything in this contract to the contrary~~ Seller agrees to ship these goods not later than April 15, 1938.

1938 ~~2-11~~
GEO. J. MEYER MANUFACTURING CO.
(SELLER)

By _____
WITNESS FOR SELLER

By _____
WITNESS FOR BUYER

Two witnesses desired by _____
All contracts subject to approval by an officer of seller corporation at home office; not subject to cancellation.

CONTRACT

NOTE: Do not sign this copy after it is signed.

County _____ State _____ Date 1938 _____
 Geo. J. Meyer Manufacturing Co., a Corporation, Cudahy, Wis., (Seller) SHIP as follows:

(Suburb of Milwaukee)

on or about subject to delays beyond your control

(BUYER)

W. L. N.
 TO
 AT

F. O. B.

Street _____ City _____ State _____
 ONLY THE GOODS AS SPECIFIED IN DETAIL HEREIN CAN BE SHIPPED TO THE FACTORY GUARDY
 VERBAL UNDERSTANDING IS NOT BINDING UNLESS SPECIFIED IN THIS CONTRACT

LIST PRICE OF ALL ITEMS ORDERED

Cars Factory Cudahy _____ Add Freight \$ _____ Add Pacing \$ _____ Total \$ _____
 Bottle Conveyor @ \$12.00 / ft _____ Angle Brkts @ \$75 _____ Drives @ \$150 _____

1st 12-13-14-15-16-17-18-19-20-21-22-23-24-25-26-27-28-29-30-31-32-33-34-35-36-37-38-39-40-41-42-43-44-45-46-47-48-49-50-51-52-53-54-55-56-57-58-59-60-61-62-63-64-65-66-67-68-69-70-71-72-73-74-75-76-77-78-79-80-81-82-83-84-85-86-87-88-89-90-91-92-93-94-95-96-97-98-99-100-101-102-103-104-105-106-107-108-109-110-111-112-113-114-115-116-117-118-119-120-121-122-123-124-125-126-127-128-129-130-131-132-133-134-135-136-137-138-139-140-141-142-143-144-145-146-147-148-149-150-151-152-153-154-155-156-157-158-159-160-161-162-163-164-165-166-167-168-169-170-171-172-173-174-175-176-177-178-179-180-181-182-183-184-185-186-187-188-189-190-191-192-193-194-195-196-197-198-199-200-201-202-203-204-205-206-207-208-209-210-211-212-213-214-215-216-217-218-219-220-221-222-223-224-225-226-227-228-229-230-231-232-233-234-235-236-237-238-239-240-241-242-243-244-245-246-247-248-249-250-251-252-253-254-255-256-257-258-259-260-261-262-263-264-265-266-267-268-269-270-271-272-273-274-275-276-277-278-279-280-281-282-283-284-285-286-287-288-289-290-291-292-293-294-295-296-297-298-299-300-301-302-303-304-305-306-307-308-309-310-311-312-313-314-315-316-317-318-319-320-321-322-323-324-325-326-327-328-329-330-331-332-333-334-335-336-337-338-339-340-341-342-343-344-345-346-347-348-349-350-351-352-353-354-355-356-357-358-359-360-361-362-363-364-365-366-367-368-369-370-371-372-373-374-375-376-377-378-379-380-381-382-383-384-385-386-387-388-389-390-391-392-393-394-395-396-397-398-399-400-401-402-403-404-405-406-407-408-409-410-411-412-413-414-415-416-417-418-419-420-421-422-423-424-425-426-427-428-429-430-431-432-433-434-435-436-437-438-439-440-441-442-443-444-445-446-447-448-449-450-451-452-453-454-455-456-457-458-459-460-461-462-463-464-465-466-467-468-469-470-471-472-473-474-475-476-477-478-479-480-481-482-483-484-485-486-487-488-489-490-491-492-493-494-495-496-497-498-499-500-501-502-503-504-505-506-507-508-509-510-511-512-513-514-515-516-517-518-519-520-521-522-523-524-525-526-527-528-529-530-531-532-533-534-535-536-537-538-539-540-541-542-543-544-545-546-547-548-549-550-551-552-553-554-555-556-557-558-559-560-561-562-563-564-565-566-567-568-569-570-571-572-573-574-575-576-577-578-579-580-581-582-583-584-585-586-587-588-589-590-591-592-593-594-595-596-597-598-599-600-601-602-603-604-605-606-607-608-609-610-611-612-613-614-615-616-617-618-619-620-621-622-623-624-625-626-627-628-629-630-631-632-633-634-635-636-637-638-639-640-641-642-643-644-645-646-647-648-649-650-651-652-653-654-655-656-657-658-659-660-661-662-663-664-665-666-667-668-669-670-671-672-673-674-675-676-677-678-679-680-681-682-683-684-685-686-687-688-689-690-691-692-693-694-695-696-697-698-699-700-701-702-703-704-705-706-707-708-709-710-711-712-713-714-715-716-717-718-719-720-721-722-723-724-725-726-727-728-729-730-731-732-733-734-735-736-737-738-739-740-741-742-743-744-745-746-747-748-749-750-751-752-753-754-755-756-757-758-759-760-761-762-763-764-765-766-767-768-769-770-771-772-773-774-775-776-777-778-779-780-781-782-783-784-785-786-787-788-789-790-791-792-793-794-795-796-797-798-799-800-801-802-803-804-805-806-807-808-809-810-811-812-813-814-815-816-817-818-819-820-821-822-823-824-825-826-827-828-829-830-831-832-833-834-835-836-837-838-839-840-841-842-843-844-845-846-847-848-849-850-851-852-853-854-855-856-857-858-859-860-861-862-863-864-865-866-867-868-869-870-871-872-873-874-875-876-877-878-879-880-881-882-883-884-885-886-887-888-889-890-891-892-893-894-895-896-897-898-899-900-901-902-903-904-905-906-907-908-909-910-911-912-913-914-915-916-917-918-919-920-921-922-923-924-925-926-927-928-929-930-931-932-933-934-935-936-937-938-939-940-941-942-943-944-945-946-947-948-949-950-951-952-953-954-955-956-957-958-959-960-961-962-963-964-965-966-967-968-969-970-971-972-973-974-975-976-977-978-979-980-981-982-983-984-985-986-987-988-989-990-991-992-993-994-995-996-997-998-999-1000-1001-1002-1003-1004-1005-1006-1007-1008-1009-1010-1011-1012-1013-1014-1015-1016-1017-1018-1019-1020-1021-1022-1023-1024-1025-1026-1027-1028-1029-1030-1031-1032-1033-1034-1035-1036-1037-1038-1039-1040-1041-1042-1043-1044-1045-1046-1047-1048-1049-1050-1051-1052-1053-1054-1055-1056-1057-1058-1059-1060-1061-1062-1063-1064-1065-1066-1067-1068-1069-1070-1071-1072-1073-1074-1075-1076-1077-1078-1079-1080-1081-1082-1083-1084-1085-1086-1087-1088-1089-1090-1091-1092-1093-1094-1095-1096-1097-1098-1099-1100-1101-1102-1103-1104-1105-1106-1107-1108-1109-1110-1111-1112-1113-1114-1115-1116-1117-1118-1119-1120-1121-1122-1123-1124-1125-1126-1127-1128-1129-1130-1131-1132-1133-1134-1135-1136-1137-1138-1139-1140-1141-1142-1143-1144-1145-1146-1147-1148-1149-1150-1151-1152-1153-1154-1155-1156-1157-1158-1159-1160-1161-1162-1163-1164-1165-1166-1167-1168-1169-1170-1171-1172-1173-1174-1175-1176-1177-1178-1179-1180-1181-1182-1183-1184-1185-1186-1187-1188-1189-1190-1191-1192-1193-1194-1195-1196-1197-1198-1199-1200-1201-1202-1203-1204-1205-1206-1207-1208-1209-1210-1211-1212-1213-1214-1215-1216-1217-1218-1219-1220-1221-1222-1223-1224-1225-1226-1227-1228-1229-1230-1231-1232-1233-1234-1235-1236-1237-1238-1239-1240-1241-1242-1243-1244-1245-1246-1247-1248-1249-1250-1251-1252-1253-1254-1255-1256-1257-1258-1259-1260-1261-1262-1263-1264-1265-1266-1267-1268-1269-1270-1271-1272-1273-1274-1275-1276-1277-1278-1279-1280-1281-1282-1283-1284-1285-1286-1287-1288-1289-1290-1291-1292-1293-1294-1295-1296-1297-1298-1299-1300-1301-1302-1303-1304-1305-1306-1307-1308-1309-1310-1311-1312-1313-1314-1315-1316-1317-1318-1319-1320-1321-1322-1323-1324-1325-1326-1327-1328-1329-1330-1331-1332-1333-1334-1335-1336-1337-1338-1339-1340-1341-1342-1343-1344-1345-1346-1347-1348-1349-1350-1351-1352-1353-1354-1355-1356-1357-1358-1359-1360-1361-1362-1363-1364-1365-1366-1367-1368-1369-1370-1371-1372-1373-1374-1375-1376-1377-1378-1379-1380-1381-1382-1383-1384-1385-1386-1387-1388-1389-1390-1391-1392-1393-1394-1395-1396-1397-1398-1399-1400-1401-1402-1403-1404-1405-1406-1407-1408-1409-1410-1411-1412-1413-1414-1415-1416-1417-1418-1419-1420-1421-1422-1423-1424-1425-1426-1427-1428-1429-1430-1431-1432-1433-1434-1435-1436-1437-1438-1439-1440-1441-1442-1443-1444-1445-1446-1447-1448-1449-1450-1451-1452-1453-1454-1455-1456-1457-1458-1459-1460-1461-1462-1463-1464-1465-1466-1467-1468-1469-1470-1471-1472-1473-1474-1475-1476-1477-1478-1479-1480-1481-1482-1483-1484-1485-1486-1487-1488-1489-1490-1491-1492-1493-1494-1495-1496-1497-1498-1499-1500-1501-1502-1503-1504-1505-1506-1507-1508-1509-1510-1511-1512-1513-1514-1515-1516-1517-1518-1519-1520-1521-1522-1523-1524-1525-1526-1527-1528-1529-1530-1531-1532-1533-1534-1535-1536-1537-1538-1539-1540-1541-1542-1543-1544-1545-1546-1547-1548-1549-1550-1551-1552-1553-1554-1555-1556-1557-1558-1559-1560-1561-1562-1563-1564-1565-1566-1567-1568-1569-1570-1571-1572-1573-1574-1575-1576-1577-1578-1579-1580-1581-1582-1583-1584-1585-1586-1587-1588-1589-1590-1591-1592-1593-1594-1595-1596-1597-1598-1599-1600-1601-1602-1603-1604-1605-1606-1607-1608-1609-1610-1611-1612-1613-1614-1615-1616-1617-1618-1619-1620-1621-1622-1623-1624-1625-1626-1627-1628-1629-1630-1631-1632-1633-1634-1635-1636-1637-1638-1639-1640-1641-1642-1643-1644-1645-1646-1647-1648-1649-1650-1651-1652-1653-1654-1655-1656-1657-1658-1659-1660-1661-1662-1663-1664-1665-1666-1667-1668-1669-1670-1671-1672-1673-1674-1675-1676-1677-1678-1679-1680-1681-1682-1683-1684-1685-1686-1687-1688-1689-1690-1691-1692-1693-1694-1695-1696-1697-1698-1699-1700-1701-1702-1703-1704-1705-1706-1707-1708-1709-1710-1711-1712-1713-1714-1715-1716-1717-1718-1719-1720-1721-1722-1723-1724-1725-1726-1727-1728-1729-1730-1731-1732-1733-1734-1735-1736-1737-1738-1739-1740-1741-1742-1743-1744-1745-1746-1747-1748-1749-1750-1751-1752-1753-1754-1755-1756-1757-1758-1759-1760-1761-1762-1763-1764-1765-1766-1767-1768-1769-1770-1771-1772-1773-1774-1775-1776-1777-1778-1779-1780-1781-1782-1783-1784-1785-1786-1787-1788-1789-1790-1791-1792-1793-1794-1795-1796-1797-1798-1799-1800-1801-1802-1803-1804-1805-1806-1807-1808-1809-1810-1811-1812-1813-1814-1815-1816-1817-1818-1819-1820-1821-1822-1823-1824-1825-1826-1827-1828-1829-1830-1831-1832-1833-1834-1835-1836-1837-1838-1839-1840-1841-1842-1843-1844-1845-1846-1847-1848-1849-1850-1851-1852-1853-1854-1855-1856-1857-1858-1859-1860-1861-1862-1863-1864-1865-1866-1867-1868-1869-1870-1871-1872-1873-1874-1875-1876-1877-1878-1879-1880-1881-1882-1883-1884-1885-1886-1887-1888-1889-1890-1891-1892-1893-1894-1895-1896-1897-1898-1899-1900-1901-1902-1903-1904-1905-1906-1907-1908-1909-1910-1911-1912-1913-1914-1915-1916-1917-1918-1919-1920-1921-1922-1923-1924-1925-1926-1927-1928-1929-1930-1931-1932-1933-1934-1935-1936-1937-1938-1939-1940-1941-1942-1943-1944-1945-1946-1947-1948-1949-1950-1951-1952-1953-1954-1955-1956-1957-1958-1959-1960-1961-1962-1963-1964-1965-1966-1967-1968-1969-1970-1971-1972-1973-1974-1975-1976-1977-1978-1979-1980-1981-1982-1983-1984-1985-1986-1987-1988-1989-1990-1991-1992-1993-1994-1995-1996-1997-1998-1999-2000-2001-2002-2003-2004-2005-2006-2007-2008-2009-2010-2011-2012-2013-2014-2015-2016-2017-2018-2019-2020-2021-2022-2023-2024-2025-2026-2027-2028-2029-2030-2031-2032-2033-2034-2035-2036-2037-2038-2039-2040-2041-2042-2043-2044-2045-2046-2047-2048-2049-2050-2051-2052-2053-2054-2055-2056-2057-2058-2059-2060-2061-2062-2063-2064-2065-2066-2067-2068-2069-2070-2071-2072-2073-2074-2075-2076-2077-2078-2079-2080-2081-2082-2083-2084-2085-2086-2087-2088-2089-2090-2091-2092-2093-2094-2095-2096-2097-2098-2099-2100-2101-2102-2103-2104-2105-2106-2107-2108-2109-2110-2111-2112-2113-2114-2115-2116-2117-2118-2119-2120-2121-2122-2123-2124-2125-2126-2127-2128-2129-2130-2131-2132-2133-2134-2135-2136-2137-2138-2139-2140-2141-2142-2143-2144-2145-2146-2147-2148-2149-2150-2151-2152-2153-2154-2155-2156-2157-2158-2159-2160-2161-2162-2163-2164-2165-2166-2167-2168-2169-2170-2171-2172-2173-2174-2175-2176-2177-2178-2179-2180-2181-2182-2183-2184-2185-2186-2187-2188-2189-2190-2191-2192-2193-2194-2195-2196-2197-2198-2199-2200-2201-2202-2203-2204-2205-2206-2207-2208-2209-2210-2211-2212-2213-2214-2215-2216-2217-2218-2219-2220-2221-2222-2223-2224-2225-2226-2227-2228-2229-2230-2231-2232-2233-2234-2235-2236-2237-2238-2239-2240-2241-2242-2243-2244-2245-2246-2247-2248-2249-2250-2251-2252-2253-2254-2255-2256-2257-2258-2259-2260-2261-2262-2263-2264-2265-2266-2267-2268-2269-2270-2271-2272-2273-2274-2275-2276-2277-2278-2279-2280-2281-2282-2283-2284-2285-2286-2287-2288-2289-2290-2291-2292-2293-2294-2295-2296-2297-2298-2299-2300-2301-2302-2303-2304-2305-2306-2307-2308-2309-2310-2311-2312-2313-2314-2315-2316-2317-2318-2319-2320-2321-2322-2323-2324-2325-2326-2327-2328-2329-2330-2331-2332-2333-2334-2335-2336-2337-2338-2339-2340-2341-2342-2343-2344-2345-2346-2347-2348-2349-2350-2351-2352-2353-2354-2355-2356-2357-2358-2359-2360-2361-2362-2363-2364-2365-2366-2367-2368-2369-2370-2371-2372-2373-2374-2375-2376-2377-2378-2379-2380-2381-2382-2383-2384-2385-2386-2387-2388-2389-2390-2391-2392-2393-2394-2395-2396-2397-2398-2399-2400-2401-2402-2403-2404-2405-2406-2407-2408-2409-2410-2411-2412-2413-2414-2415-2416-2417-2418-2419-2420-2421-2422-2423-2424-2425-2426-2427-2428-2429-2430-2431-2432-2433-2434-2435-2436-2437-2438-2439-2440-2441-2442-2443-2444-2445-2446-2447-2448-2449-2450-2451-2452-2453-2454-2455-2456-2457-2458-2459-2460-2461-2462-2463-2464-2465-2466-2467-2468-2469-2470-2471-2472-2473-2474-2475-2476-2477-2478-2479-2480-2481-2482-2483-2484-2485-2486-2487-2488-2489-2490-2491-2492-2493-2494-2495-2496-2497-2498-2499-2500-2501-2502-2503-2504-2505-2506-2507-2508-2509-2510-2511-2512-2513-2514-2515-2516-2517-2518-2519-2520-2521-2522-2523-2524-2525-2526-2527-2528-2529-2530-2531-2532-2533-2534-2535-2536-2537-2538-2539-2540-2541-2542-2543-2544-2545-2546-2547-2548-2549-2550-2551-2552-2553-2554-2555-2556-2557-2558-2559-2560-2561-2562-2563-2564-2565-2566-2567-2568-2569-2570-2571-2572-2573-2574-2575-2576-2577-2578-2579

State of California,
County of Los Angeles—ss.

L. L. Lambing being by me first duly sworn, deposes and says: that he is an officer, to wit, the secretary of Monarch Brewing Company, a corporation, the Plaintiff in the above entitled action; that he has read the foregoing Complaint and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

L. L. LAMBING

Subscribed and sworn to before me this 15 day of May, 1940.

(Seal)

CATHERINE KIMZEY,

Notary Public in and for the County of Los Angeles,
State of California.

My Commission Expires July 14, 1943.

[Endorsed]. Filed May 16 P. M. 4:02, 1940. L. E. Lampton, County Clerk, By G. G. Dunn, Deputy.

[9]

[Title of Superior Court and Cause.]

PETITION FOR REMOVAL OF CAUSE TO
THE CENTRAL DIVISION OF THE
UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF CALI-
FORNIA.

To the Honorable the Superior Court of the State
of California, in and for the County of Los
Angeles:

Your petitioner, George J. Meyer Manufacturing
Company, a corporation, respectfully shows to this
Honorable Court:

I.

That your petitioner is the defendant in the above
entitled action; that said action was heretofore
brought by plaintiff above named in this Court and
is now pending therein and that summons has been
issued therein; that the time has not yet expired
[10] within which your petitioner is required by the
laws of the State of California or the rules of this
Court to answer or plead to plaintiff's complaint
on file in said action.

II.

That plaintiff was at the time of the commence-
ment of said action, and still is, a corporation duly
organized and existing under and by virtue of the
laws of the State of California, and having its princi-
pal office and place of business in the County of Los

Angeles, State of California, and is accordingly a citizen and resident of said County of Los Angeles, in the Central Division of the Southern District of California; that your petitioner at the time of the commencement of this action was, and still is, a corporation duly organized and existing under the laws of the State of Wisconsin, having its principal place of business in the County of Milwaukee, State of Wisconsin, and is a citizen and resident of said State of Wisconsin and a non-resident of said State of California; that the above entitled action, therefore, involves a controversy between citizens of different states.

III.

That the above entitled action is of a civil nature and was brought by the plaintiff for the purpose of recovering damages in the sum of Fifty Thousand Dollars (\$50,000.00) alleged to have been incurred by plaintiff by reason of your petitioner's alleged breach of an alleged warranty, all as more fully appears from plaintiff's complaint on file in said action, which said complaint is hereby referred to and made a part hereof; that your petitioner denies the alleged liability, the alleged damages and disputes the claim of plaintiff; that the matter in controversy between plaintiff and your petitioner at the time of the commencement of the above entitled action exceeded, ever since has exceeded, and [11] now exceeds, the sum and value of Three Thousand Dollars (\$3,000.00), exclusive of interest

and costs; that the matter in controversy is the alleged breach by your petitioner of the alleged warranty, as set forth in said complaint and which breach as aforesaid is alleged to have caused damage to the plaintiff in the sum of Fifty Thousand Dollars (\$50,000.00).

IV.

That your petitioner avers that it has made and filed herein its bond with good and sufficient surety that it will, within thirty (30) days from the date of filing this petition, enter in the Central Division of the District Court of the United States for the Southern District of California, a certified copy of the record in this cause, and for special bail, should any have been required, and for the payment of all costs that may be awarded by the said District Court, should said District Court hold that said action was wrongfully or improperly removed thereto; that your petitioner desires to remove said cause into the Central Division of the District Court of the United States for the Southern District of California, the action being one of which the District Courts of the United States are given original jurisdiction.

Wherefore, your petitioner prays that this petition and said bond be accepted by this Honorable Court and that the said action be removed to the said District Court pursuant to the statute in such cases made and provided, and that a transcript of

the record herein be made and certified as provided by law and that this Court proceed no further in this action.

LAWLER, FELIX & HALL,
MAX FELIX,
WILLIAM T. COFFIN,
By WILLIAM T. COFFIN,
Attorneys for defendant and
petitioner, George J. Meyer
Manufacturing Company.

[12]

State of California,
County of Los Angeles—ss.

William T. Coffin, being by me first duly sworn, deposes and says: that he is one of the attorneys for George J. Meyer Manufacturing Company, a corporation, the defendant in the above entitled action; that he has read the foregoing Petition for Removal of Cause to the Central Division of the United States District Court for the Southern District of California and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon information or belief, and as to those matters that he believes it to be true.

That affiant makes this verification for and on behalf of said corporation, for the reason that no officer thereof is within the County of Los Angeles,

or the State of California, wherein affiant and his associate counsel maintain their offices.

WILLIAM T. COFFIN

Subscribed and sworn to before me this 27th day of May, 1940.

(Seal)

SADIE BROWN,

Notary Public in and for the County of Los Angeles,
State of California.

Received copy of the within Petition this 27th day of May, 1940.

ALFRED F. MacDONALD

C. WELLS

[Endorsed]: Filed May 27, PM 2:38, 1940. L. E. Lampton, County Clerk. By M. E. Gift, Deputy.

[13]

[Title of District Court and Cause.]

BOND ON REMOVAL.

Know All Men By These Presents:

That George J. Meyer Manufacturing Company, a corporation, defendant in the above entitled action, as Principal, and United States Fidelity and Guaranty Company, a corporation organized for the purpose, among others, of becoming surety upon bonds and undertakes, as Surety, the parties of the first part, are held and firmly bound unto Monarch Brewing Company, a corporation, plaintiff above named, party of the second part, in the sum of

\$500.00, lawful money of the United States, for the payment whereof well and truly to be made unto said party of the second part, the parties of the first part bind themselves, their successors and assigns, jointly and [14] severally by these presents.

Nevertheless upon these conditions:

That the said Principal having filed or being about to file its petition in the Superior Court of the State of California, in and for the County of Los Angeles praying for the removal of a certain cause therein pending as above entitled wherein the party of the second part is plaintiff and the said Principal is defendant, to the Central Division of the District Court of the United States for the Southern District of California.

Now, Therefore, if the said Principal shall enter into said District Court of the United States within thirty days from the date of filings its said Petition for Removal a certified copy of the record in said action, and also shall appear therein and enter special bail in said action, if special bail was originally requisite therein, and shall well and truly pay all costs that may be awarded by the said District Court if said District Court shall hold that said action was wrongfully or improperly removed thereto, then this obligation shall be void, otherwise it shall remain in full force and virtue.

In Witness Whereof the said George J. Meyer Manufacturing Company, a corporation, and the said United States Fidelity and Guaranty Company,

a corporation, have caused these presents to be executed this 27th day of May, 1940.

GEORGE J. MEYER MANUFACTURING COMPANY,

By WILLIAM T. COFFIN,

[Seal]

One of its attorneys.

UNITED STATES FIDELITY AND GUARANTY COMPANY,

By H. C. GILLESPIE,

[Seal]

Attorney-in-Fact.

Approved:

KURTZ KAUFFMAN,

Court Commissioner of Los Angeles
County.

Dated: May 27th, 1940. [15]

State of California,
County of Los Angeles—ss.

On this 27th day of May, A. D. 1940, before me, Sadie Brown, a Notary Public in and for said County and State personally appeared William T. Coffin, known to me to be one of the attorneys for George J. Meyer Manufacturing Company, a corporation, and known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same, as such attorney.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year

in this certificate first above written.

[Notarial Seal] SADIE BROWN,
Notary Public in and for the County of Los An-
geles, State of California.

State of California,
County of Los Angeles—ss.

On this 27th day of May in the year one thousand nine hundred and forty, before me, Agnes L. Whyte a Notary Public in and for said County and State, residing therein, duly commissioned and sworn, personally appeared H. C. Gillespie, known to me to be the duly authorized Attorney-in-fact of the United States Fidelity and Guaranty Company, and the same person whose name is subscribed to the within instrument as the Attorney-in-fact of said Company and the said H. C. Gillespie duly acknowledged to me that he subscribed the name of the United States Fidelity and Guaranty Company thereto as Surety and his own name as Attorney-in-fact.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Notarial Seal] AGNES L. WHYTE,
Notary Public in and for Los Angeles County, State
of California. My Commission Expires Feb. 26,
1941.

Received copy of the within Bond this 27th day of May, 1940.

ALFRED F. MacDONALD
C. WELLS

[Endorsed]: Filed May 27, P. M. 2:38, 1940.
L. E. Lampton, County Clerk. By M. F. Gift,
Deputy. [16]

[Title of Superior Court and Cause.]

ORDER FOR REMOVAL

It appearing to the satisfaction of this Court that George J. Meyer Manufacturing Company, a corporation, defendant named in the above entitled action, has this day filed its Petition for Removal of this cause to the Central Division of the District Court of the United States for the Southern District of California, in accordance with the statute therefor provided, and that said defendant has also this day filed its Bond on Removal duly conditioned with good and sufficient surety as provided by law, and it appearing that said Petition for Removal and said Bond were so filed before the presentation thereof to this Court for acceptance and it appearing that due and sufficient written notice of said Petition and Bond for Removal have been given to the plaintiff above named prior to the filing of the same, and the presentation thereof to this Court for approval and it appearing that this is a proper cause for removal to the said District Court: Now, therefore it is hereby ordered, adjudged and [18]

decreed that the said Petition and Bond are hereby accepted, and that this cause be, and it hereby is, removed to the Central Division of the District Court of the United States for the Southern District of California, and the clerk of this court is hereby directed to make up and certify a copy of the record in said cause for transmission to said District Court forthwith.

Dated this 27th day of May, 1940.

THOMAS C. GOULD,

Presiding Judge of the Superior Court

[Endorsed]: Filed May 27 PM 3 09 1940. L. E. Lampton, County Clerk. By I. L. Murstein, Deputy.

State of California,
County of Los Angeles—ss.

I, L. E. Lampton, County Clerk and ex-officio Clerk of the Superior Court in and for the County and State aforesaid, do hereby certify the foregoing copies of documents and orders consisting of Complaint, Notice of Filing and Hearing Petition for Removal, Petition for Removal, Bond on Removal, and written Order for Removal to the District Court of the United States for the Southern District of California (Central Division), in the action of Monarch Brewing Company, a corporation vs. Geo. J. Meyer Manufacturing Co., a corporation, to be full, true and correct copies of all of the original documents on file and/or of record in this office in said action, to date.

In witness whereof, I have hereunto set my hand

and affixed the seal of the Superior Court this 19th day of June, 1940.

L. E. LAMPTON,
County Clerk and ex-officio Clerk of the Superior
Court of the State of California, in and for the
County of Los Angeles,
By M. B. WARD,
Deputy.

[Endorsed]: No. 1035-Y, Civ. Filed Jun. 21,
1940. R. S. Zimmerman, Clerk. [19]

[Title of District Court and Cause.]

MOTION TO DISMISS, MOTION FOR MORE
DEFINITE STATEMENT, AND MOTION
FOR BILL OF PARTICULARS

and

NOTICE OF HEARING OF MOTIONS.

Defendant moves the Court as follows:

I.

To dismiss the action because the complaint fails to state a claim against defendant upon which relief can be granted.

II.

To order plaintiff to file a more definite statement of its claim in the following respects:

1. By stating how and in what respects the machinery referred to in plaintiff's complaint "failed to work properly", as alleged in Paragraph VII of the complaint.

2. By stating whether all of the machinery referred to in plaintiff's complaint, or only a part thereof, failed to work properly, and if only a part of said machinery, what part or parts thereof and in what respects the same are claimed to have failed to work properly.

3. By stating what are "all of the things which plaintiff desired to have done and performed", referred to in Paragraph IV of plaintiff's complaint. [20]

III.

To order plaintiff to file a bill of particulars in the following respects:

1. Specifying the dates on which the damages alleged in Paragraph VIII of plaintiff's complaint are claimed to have been sustained and the amount of damages claimed on each date.

2. Specifying the nature of each item of the damages alleged in Paragraph VIII of the complaint.

3. Specifying the "various parts" of the machinery referred to in the complaint which are alleged in Paragraph VIII of the complaint to have been broken and become out of adjustment.

LAWLER, FELIX & HALL,
MAX FELIX,
WILLIAM T. COFFIN,
By WILLIAM T. COFFIN,
Attorneys for Defendant.

NOTICE OF HEARING OF MOTIONS.

To the Plaintiff Above Named, and to Alfred F. MacDonald, Esquire, Its Attorney:

Please Take Notice that the undersigned will bring the foregoing motions on for hearing before this Court at Courtroom No. 5, in the United States Post Office and Court House Building, Los Angeles, California, on the 8th day of July, 1940, at the hour of 10:00 o'clock in the forenoon of that day, or as [21] soon thereafter as counsel may be heard.

Dated this 26th day of June, 1940.

LAWLER, FELIX & HALL,
MAX FELIX,
WILLIAM T. COFFIN,
By WILLIAM T. COFFIN,
Attorneys for Defendant.

[Endorsed]: Filed Jun. 27, 1940. [22]

At a stated term, to wit: The February Term, A. D. 1940, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday the 15th day of July in the year of our Lord one thousand nine hundred and forty.

Present: The Honorable Leon R. Yankwich,
District Judge.

No. 1035-Y Civil

MONARCH BREWING COMPANY,
a Corporation,

Plaintiff,

vs.

GEORGE J. MEYER MANUFACTURING
COMPANY, a Corporation,

Defendant.

This cause coming on for (1) hearing motion to dismiss, and (2) hearing motion for a more definite statement and motion for Bill of Particulars; Alfred F. MacDonald, Esq., appearing as counsel for the plaintiff; Wm. T. Coffin, Esq., appearing as counsel for the defendant:

Attorney Coffin presents both of the said motions, and Attorney MacDonald replies. It is ordered that the said motions be granted, and the plaintiff is allowed twenty (20) days in which to file amended complaint; and it is ordered the Bill of Particulars be denied. [23]

In the District Court of the United States, Southern
District of California, Central Division

No. 1035-Y Civil

MONARCH BREWING COMPANY,
a corporation,

Plaintiff,

vs.

GEORGE J. MEYER MANUFACTURING
COMPANY, a corporation,

Defendant.

AMENDED COMPLAINT—DAMAGES FOR
BREACH OF WARRANTY

Comes now the above named plaintiff and complaining of the above named defendant for cause of action, alleges as follows:

I.

That plaintiff, Monarch Brewing Company, is now, and at all times herein mentioned has been, a corporation duly organized and existing under and by virtue of the laws of the State of California, and having for its principal place of business the City of Los Angeles, County of Los Angeles, State of California, and is accordingly a citizen and resident of said County of Los Angeles, in the Central Division of the Southern District of California.

That defendant, George J. Meyer Manufacturing Company, is now, and at all times herein mentioned has been, a corporation duly organized and existing

under and by virtue of the laws of the State of Wisconsin, and having for its principal place of business the City of Cudahy, County of Milwaukee, State of Wisconsin; and is a citizen and resident of said State of Wisconsin, and a non-resident of the State of California.

II.

That the matter in controversy between plaintiff and defendant, at the time of the commencement of the above entitled [24] action, exceeded, ever since has exceeded and now exceeds the sum and value of Three Thousand (\$3,000.00) Dollars, exclusive of interest and costs.

III.

That plaintiff, at all times herein mentioned, has been and now is engaged in the business of brewing, bottling and selling beer. That prior to the time of entering into the contract hereinafter referred to, plaintiff, in the bottling of its beer, was using certain machinery, the operation of which required the services of seventeen (17) men, and the maximum production of which was fifteen hundred (1500) cases of eleven (11) ounce, steinie bottles per day; that the cost of the bottling labor for each case of beer bottled by said machinery was nine (9¢) cents per case.

That it was plaintiff's desire to acquire new bottling machinery, which said machinery would increase to a substantial extent the production of the cases of beer bottled per day, and at the same time

reduce the operating expenses connected therewith. That in addition thereto, it was plaintiff's desire to acquire beer bottling machinery which would be reasonably fit for the particular purpose for which said machinery was required—to-wit: the bottling of the beer manufactured by plaintiff.

That plaintiff, prior to the 14th day of February, 1938, communicated to the defendant its desires, as hereinbefore set forth, and defendant did thereupon represent to plaintiff as follows:

1. That defendant was the manufacturer of certain beer bottling machinery described as follows: Bottle cleaner, complete with motor and continuous soaker drive, 1840 bottles immersed, a 40 valve filler, and a #1050 cataract pasteurizer, [25] which said machinery was, as to quality and fitness, such as to meet the needs and requirements of plaintiff, and that said machinery required in its operation the services *on* only twenty (20) men per day, and that said machinery was capable of, and would produce thirty-six hundred (3600) cases of eleven (11) ounce steinie bottles per day, resulting in a bottling labor saving of between 4.5 cents and 5¢ per case per day.

2. That the services of only two (2) men would be required to load that portion of said machinery known as the cleaner, and that the bottles coming out of the cleaner required the services of no person to control or supervise the unloading of said bottles coming out of the

cleaner, inasmuch as the said machinery was equipped with an automatic unloader, which dispensed with labor in this particular.

3. That that portion of the machinery known as the pasteurizer, was so constructed that it had an automatic load and unload, thereby dispensing with the services of any person to supervise or control the unloading of the bottles at the take-off end of the pasteurizer.

4. That that portion of the machinery known as the soaker had a rated speed, or capacity, to handle empty bottles placed therein, of between one hundred sixty (160) and one hundred eighty (180) bottles per minute, which figures were conservative and were net of any normal shut-downs or breakdowns in the operation of said machinery.

5. That said equipment had a long life, and that the depreciation thereof did not exceed five (5%) percent to ten (10%) percent depreciation per annum. [26]

6. That the maintenance and repair costs on said machinery would be lower than on the machinery then being used by the plaintiff.

7. That said machinery would clean bottles with only a two and one-half percent ($2\frac{1}{2}\%$) solution of caustic soda.

8. That that portion of the machinery known as the pasteurizer was self-cleaning, and that said pasteurizer was so constructed that all

bottled beer passing through same would, at all times, be properly pasteurized.

IV.

That defendant having full knowledge of the needs and requirements of plaintiff in the matter of bottling its beer, and plaintiff having made known to defendant the particular purposes for which said machinery was required, defendant did recommend to plaintiff the purchase of the following described machinery:

- 1 #516 Qt. Meyer Dumore Bottle Cleaner complete with motor and continuous soaker drive, 1840 bottles immersed,
- 1 40 valve Meyer Dumore Filler,
- 1 #1050 Meyer Cataract Pasteurizer,

and represented that said machinery was reasonably fit for the particular purpose for which the same was required by plaintiff.

Whereupon, plaintiff did, on or about the 14th day of February, 1938, enter into an agreement with defendant, whereby plaintiff agreed to purchase from defendant, and defendant agreed to sell to plaintiff, the machinery above described for the total purchase price of Fifty-two Thousand, Seven, Hundred (\$52,700.00) Dollars, payable Thirty-five Hundred (\$3500.00) Dollars down payment in cash, and the balance in monthly payments until the full purchase price was paid. [27]

V.

That at the time of the execution of the aforesaid contract of sale by the parties thereto, plaintiff had no knowledge whatsoever of the quality and fitness of said machinery to perform the work and services required by plaintiff; that at the time of the execution of said agreement, defendant assumed to have knowledge, and through its agents stated and represented to plaintiff that said machinery would in a satisfactory manner perform and do all the things which plaintiff desired to have done and performed by reason of the purchase of said machinery.

That at the time of the purchase of said machinery, plaintiff relied solely upon the representations made as aforesaid by defendant to plaintiff, and the superior knowledge which defendant assumed to have concerning the quality and fitness of said machinery to do the work required by plaintiff.

That plaintiff would not have entered into said contract for the purchase of said machinery, had it known (as hereinafter alleged) that said machinery would not do and perform the work as warranted by the defendant.

VI.

That defendant shipped said machinery to plaintiff on or about April 27, 1938, and also furnished an engineer to supervise the installation and erection of said machinery in plaintiff's brewery plant.

That ever since such installation and erection said machinery has failed to work properly and has been totally unfit for the particular purposes for which the same was required to meet the needs and requirements of plaintiff.

That from May 6, 1938 to July 9, 1938, defendant's agents and employees consumed a period of three hundred and thirteen hours (313) in attempting to make said machinery work properly and in [28] accordance with defendant's representations.

That plaintiff continuously from time to time in the period from July 9, 1938 to March 20, 1940, notified and complained to defendant that said machinery was not working properly or in accordance with the representations made by defendant to plaintiff at the time of the purchase thereof.

That ever since the installation and erection of said machinery up to the time of the filing of plaintiff's complaint herein, defendant has assured plaintiff that said machinery would eventually work properly, and from about the 9th day of July, 1938 to about the time of the filing of plaintiff's complaint herein, has caused its agents and employees, without charge or expense to plaintiff, to endeavor to fix and adjust said machinery so that it would work properly and become reasonably fit for the needs and requirements of plaintiff in the bottling of its beer.

That plaintiff relied upon the assurances of defendant that said machinery would eventually be

made to work properly, in compliance with defendant's representations, and did not bring immediate suit upon the implied warranty arising from defendant's representations, by reason of said reliance.

That plaintiff has performed all the matters and things agreed by it to be performed under its contract with defendant.

VII.

That ever since the installation of said machinery, and almost daily, various parts thereof broke and became out of adjustment, thereby causing shut-downs in the operation of said machinery, and by reason of said shut-downs and the failure of said machinery to properly work, and by reason of the misrepresentations of defendant made to plaintiff and inducing it to purchase said machinery, plaintiff has suffered damages as follows:

1. That representation to plaintiff that only two (2) men would be required to load bottles into that [29] portion of the machinery known as the cleaner was false and untrue; ever since the installation of said machinery, it has been necessary for plaintiff to employ and pay an additional or third man to load bottles into the cleaner.

The representation made by the defendant that the cleaner was so constructed that it had an automatic unloader and thereby required no

one to supervise or control the clean bottles coming out of the cleaner was false and untrue; ever since the installation of the machinery, by reason of the bottles tipping or falling as they came out of the unloader, it was necessary for plaintiff at all times to employ an extra man to supervise the unloader end of the cleaner.

The representation of the defendant that said machinery was so constructed that no one was required at the take-off end of the pasteurizer was false and untrue; as the bottles came out of the pasteurizer at the take-off end thereof, the said bottles tipped to such an extent that it was, and at all times has been, necessary for plaintiff to employ a man to supervise and control said bottles as they came out of said pasteurizer.

That plaintiff, by reason of the foregoing, has been compelled to employ three (3) additional men for each shift in the operation of said machinery, and also a relief man for each regular crew of eleven (11) men; that the wages of said additional men per shift amounts to the sum of Twenty-Six Dollars and Twenty Cents (\$26.20); [30] that said machinery has been operated Six hundred and fifty-seven (657) shifts, and plaintiff has thereby suffered damage in the operation of said six hundred fifty-seven (657) shifts in the total sum and amount of Seventeen Thousand, Ninety-Five Dollars and Fourteen Cents (\$17,095.14).

Plaintiff further alleges that in the event that said machinery is in operation at the end of a period of five (5) years, from the date hereof, (in accordance with the defendant's representations as to the depreciation thereof), said machinery will have been operated for eight hundred and three (803) shifts, with three (3) additional men required, as hereinabove alleged, all to plaintiff's damage in the further sum of Twenty Thousand, Eight Hundred and Eighty-Three (\$20,883.00) Dollars.

2. The representation to plaintiff that that portion of the machinery known as the pasteurizer was self-cleaning, and that said pasteurizer was so constructed that all bottled beer passing through same would at all times be properly pasteurized, was false and untrue. Said pasteurizer is not self-cleaning by reason of the poor engineering and faulty construction of the machinery, (the details of which faulty construction and poor engineering are unknown to plaintiff,) the bottle labels, during the entire operation of said [31] machinery were, and are, carried over from the cleaner and closed up the holes on the copper spray pans, thereby preventing the proper pasteurization of the beer passing through the pasteurizer. Further, said pasteurizer is not self-cleaning in that during said pasteurization, a scale was and is deposited on the spray pans, which scale also closed the holes in the pans and prevented the

proper pasteurization of beer. Further, the recording thermometer, designed to record the condition of pasteurization of all bottles passing through the pasteurizer, failed to work properly for reasons unknown to this plaintiff.

That that portion of the machinery known as the soaker and cleaner failed, for reasons unknown to plaintiff, to work properly, and as a result thereof, the bottles came out of the filler with foreign matter contained therein, which thereafter caused the beer to become cloudy and unsalable.

That from about the 16th day of June, 1938 to the 16th day of February, 1940, a total of 699.24 barrels of beer had to be dumped, under Government supervision, for the reason that the same was not fit to drink and unsalable, due to the improper pasteurization thereof and the faulty cleansing of bottles, as hereinabove set forth. That the cost of said beer so dumped, exclusive of dumping labor, [32] amounted to the sum of Four Thousand, Six Hundred and Ninety-Six Dollars and Twenty-Five Cents (\$4,696.25), and thereby, by reason of the foregoing facts, plaintiff has been damaged in the sum of Four Thousand, Six Hundred and Ninety-Six Dollars and Twenty-Five Cents (\$4,696.25).

That the barrels of beer dumped as aforesaid, constituted beer that did not leave the brewery premises, for the reason that plaintiff

discovered that the same was spoiled before said beer was marketed.

That during said period of time, a total of five thousand, two hundred and ninety-one (5,291) cases of beer, that was not fit for beverage purposes and unsalable, by reason of the machinery's failing to properly pasteurize same, was without any knowledge on the part of plaintiff of the fact that said beer was spoiled and unfit for beverage purposes, released and marketed by plaintiff to various of its customers. That when plaintiff became aware of the fact that said beer was totally unfit for beverage purposes, plaintiff was compelled to replace the same, and thereby suffered a total loss of said five thousand, two hundred and ninety-one (5,291) cases of beer. That thereby, plaintiff suffered loss and damage in the sum of Seven Thousand, Six Hundred and Sixty-Seven Dollars and Thirty-Seven Cents (\$7,667.37). [33]

That plaintiff has not yet made adjustments for all of the cases of beer that went into the hands of the trade, and alleges that for the replacement of said spoiled beer, plaintiff will suffer loss and damage in the sum of One Thousand (\$1,000.00) Dollars.

3. That of the five thousand, two hundred and ninety-one (5,291) cases of spoiled beer that was sold by plaintiff to various of its customers, a large quantity thereof was resold to

consumers before the unfitness of said beer for beverage purposes was discovered. That unfavorable publicity was given to the beer manufactured by plaintiff, as a result of the spoiled beer getting into the hands of plaintiff's customers, and, in turn, the retail trade, to such an extent that plaintiff suffered a large decrease in the volume of its business, and thereby was damaged to the extent of the profits that it otherwise would have received had its volume of business been maintained. That the damage to plaintiff, caused by said loss of volume of business and profits that otherwise would have accrued to plaintiff, was and is the sum of Fifty Thousand, One Hundred and Ninety-Two (\$50,192.00) Dollars.

4. That the representation that said machinery would clean bottles with only a two and one-half ($2\frac{1}{2}\%$) percent solution of caustic soda was false and untrue. That said machinery, in fact, will not clean bottles at the speed of operation recommended by defendant with only a two and one-half ($2\frac{1}{2}\%$) percent solution of caustic soda, [34] and ever since the month of January, 1940, plaintiff has been compelled to use a six (6%) percent solution of caustic soda, in order to obtain clean bottles when said machinery is operated at the speeds recommended by defendant. That since January 1st, 1940, and up to the 30th day of September, 1940, said machinery has been operated two

hundred and four (204) shifts. That it was necessary to use a total of five hundred (500) pounds of caustic soda per shift to increase the solution from a two and one-half (2 1/2%) percent solution to a six (6%) percent solution. That the cost of the excess caustic soda used during said period to increase said solution to a six (6%) percent solution was Four Thousand, Five Hundred and Ninety (\$4,590.00) Dollars, and that by reason thereof, and by reason of the failure of said machinery to properly clean bottles with a two and one-half (2 1/2%) percent solution of caustic soda, plaintiff has been damaged in the sum of Four Thousand, Five Hundred and Ninety (\$4,590.00) Dollars.

That plaintiff, from the period beginning October 1, 1940, and ending June 30, 1943, will be further damaged in the sum of Fourteen Thousand, Seven Hundred and Ninety (\$14,790.00) Dollars, being the cost of the excess caustic soda plaintiff will be compelled to purchase in order to maintain a six (6%) percent solution for the purpose of cleaning the bottles passing through said machinery. [35]

5. That that portion of the said machinery known as the filler is unfit for the purpose of maintaining an exact filling level of beer in the bottles. That is to say, that the filler is so designed that instead of maintaining an exact beer filling level, more than the proper amount

of beer gets into the bottles than there should be, thereby causing a loss of beer to plaintiff. That when a shut-down in the machinery occurs, the beer in the filler becomes warm, so that when the machinery is started up again, the beer foams over and is wasted and the bottles thereby are not maintained in the proper filling level. That by reason of the foregoing and the loss of beer, plaintiff has, since the installation of said machinery, suffered damages thereby in the sum of One Thousand, Two Hundred, Sixty-Two Dollars and Sixty-Three Cents (\$1,262.63).

6. That the representation of defendant that said machinery had a long life and that the depreciation thereof did not exceed five (5%) percent to ten (10%) percent depreciation per annum was false and untrue. Plaintiff alleges that it will suffer damage by reason of excessive depreciation, based upon the life of the machinery for a period of five (5) years, in the sum or amount of Twenty Seven Thousand, Nine Hundred and Twenty (\$27,920.00) Dollars.

That since the purchase of said machinery, and by reason of the failure of the same to properly work, plaintiff has been compelled to purchase various parts to replace broken parts in said machinery of the value of Two Thousand, Seven Hundred and Twenty-Nine Dol-

lars and Ninety-Eight Cents, [36] (\$2,729.98), to plaintiff's damage in said amount.

That by reason of the fact that said machinery failed to work properly, plaintiff has been compelled to expend money for machinists and laborers in an endeavor to make said machinery properly work, to plaintiff's damage in the sum of Two Thousand, Five Hundred and Thirty-One Dollars and Twenty-Five Cents (\$2,531.25).

7. That ever since the installation of said machinery, and almost daily, said machinery became out of adjustment, thereby causing shut-downs in the operation thereof. Said machinery is so constructed that the soaker, cleaner and pasteurizer operate as a unit, and the failure of any of the said pieces of machinery to operate causes a shut-down of the entire unit. That plaintiff is unable to state in detail the cause of all of the shut-downs in the operation of said machinery, and is informed and believes, and upon such information and belief alleges, that defendant itself has been unable to determine what was wrong in some particulars with said machinery, resulting in its failure to work properly. That each and every shut-down occurring in the operation of said machinery has caused plaintiff to suffer damage in that the twenty-three (23) men required to operate said machinery could perform no

labor whatsoever during the period said machinery was shut-down, thereby causing a labor loss to plaintiff. That during the period commencing in the month of July, 1938, to the 17th day of September, 1940, the labor loss [37] and damage to plaintiff, caused by shut-downs and the failure of said machinery to properly work, amounted to the sum of Twenty-Six Thousand, Four Hundred and Fifty Eight Dollars and Sixteen Cents (\$26,458.16).

That plaintiff will suffer further damage for labor losses up to June 30, 1943, to be caused as aforesaid by the failure of such machinery to work properly, in the sum of Thirty-Two Thousand, Three Hundred and Forty (\$32,340.00) Dollars.

And for a further, separate and distinct second cause of action, plaintiff alleges as follows:

I.

Plaintiff hereby refers to Paragraphs I and II of its first cause of action, and by such reference incorporates said paragraphs in this, its second cause of action, the same as though said paragraphs were set out fully and at length herein.

II.

That heretofore, on the 14th day of February, 1940, plaintiff and defendant entered into an agreement in writing, whereby plaintiff agreed to pur-

chase from defendant, and defendant agreed to sell to plaintiff, the following described property:

1 #516 Qt. Meyer Dumore Bottle Cleaner,
complete with motor and continuous soaker
drive, 1840 bottles immersed,

1 40 valve Meyer Dumore Filler,

1 #1050 Meyer Cataract Pasteurizer,

for the total purchase price of Fifty-Two Thousand, Seven Hundred (\$52,700.00) Dollars, payable Thirty-Five Hundred (\$3500.00) Dollars down payment in cash, and the balance in monthly payments until the [38] full purchase price was paid.

III.

That at the time of the execution of the agreement aforesaid, defendant, in said agreement, warranted and guaranteed the proper working of the said machinery under reasonable operation thereof, according to defendant's instructions.

That at the time of the purchase of said machinery, plaintiff relied upon the warranty aforesaid and the superior knowledge which defendant assumed to have concerning the quality and fitness of said machinery to perform and do the work required by plaintiff.

IV.

That after the execution of the aforesaid agreement in writing, and on or about the 6th day of December, 1938, said contract in writing was changed and modified by the parties thereto, in

reference only to the time and manner of payments agreed to be made by plaintiff to defendant on account of the purchase price of said machinery; that at said time, except as in the particulars hereinbefore stated, the original contract in writing, dated February 14th, 1938, was reaffirmed and all of the terms and conditions thereof again agreed upon by said parties, and defendant did again warrant and guarantee to plaintiff the proper working of the machinery under reasonable operation thereof, according to the defendant's instructions.

V.

Plaintiff hereby refers to Paragraphs V, VI and VII of its first cause of action, and by such reference incorporates said paragraphs in this, its second cause of action, the same as though said paragraphs were set out fully and at length herein.

VI.

That at all times mentioned herein, plaintiff did reasonably operate said machinery in accordance with the defendant's [39] instructions, but that, as hereinbefore set forth, said machinery failed to work properly in breach of defendant's express warranty thereof, as hereinbefore alleged.

Wherefore, plaintiff prays judgment against said defendant for the sum of Two Hundred and Fourteen Thousand, One Hundred and Fifty-Five Dollars, and Seventy-Eight Cents, (\$214,155.78); for

its costs and disbursements in this action; and for such other and further relief as may be proper.

ALFRED F. MacDONALD

Attorney for Plaintiff

State of California,

County of Los Angeles—ss.

L. Stehlin, being by me first duly sworn, deposes and says: that she is the secretary of the plaintiff corporation, Monarch Brewing Company, in the above entitled action; that she has read the foregoing Amended Complaint and knows the contents thereof; and that the same is true of her own knowledge, except as the matters which are therein stated upon her information or belief, and as to those matters that she believes it to be true.

L. STEHLIN

Subscribed and sworn to before me this 2nd day of November, 1940.

(Seal)

CARL B. STURZENACKER

Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed Nov. 5, 1940. [40]

[Title of District Court and Cause.]

ANSWER TO AMENDED COMPLAINT.

Answering plaintiff's amended complaint herein defendant, George J. Meyer Manufacturing Company, a corporation, denies, avers and alleges as follows:

Answer to First Count (First Cause of Action) of Amended Complaint.

First Defense.

That the first count (first cause of action) set forth in said amended complaint fails to state a claim against defendant upon which relief can be granted.

Second Defense.

That the right of action set forth in the first count (first cause of action) of said amended complaint did not accrue within two (2) years next before the commencement of this action, and is barred by the provisions of subdivision 1 of Section 339 of the Code of Civil Procedure of the State of California.

Third Defense.

I.

Answering Paragraph III of the first count of said amended complaint defendant admits that plaintiff at the times mentioned [41] in said amended complaint was, and is now, engaged in the business of brewing, bottling and selling beer; admits that prior to the time of entering into the

contract hereinafter referred to, plaintiff used certain machinery for the bottling of its beer; alleges that defendant is without knowledge or information sufficient to enable it to form a belief as to the truth of the averments contained in said Paragraph III respecting said machinery, to-wit: that the operation of said machinery required the services of seventeen men, or that the maximum production of said machinery was fifteen hundred cases of eleven ounce steinie bottles per day, and that the cost of the bottling labor for each case of beer bottled by said machinery was nine cents per case; admits that prior to the 14th day of February, 1938, plaintiff informed defendant that plaintiff desired to acquire new machinery for bottling beer manufactured by plaintiff, and that defendant thereupon stated that defendant was a manufacturer of beer bottling machinery, including machinery described and sold under the trade names as follows:

No. 516 Qt. Meyer Dumore Bottle Cleaner,
complete with Motor and continuous Soaker
Drive 1840 bottles immersed;

40 Valve Meyer Dumore Filler; and

No. 1050 Meyer Cataract Pasteurizer;

denies that plaintiff prior to the 14th day of February, 1938, or at any other time, communicated to defendant any desire, other than that hereinabove alleged; alleges that defendant is without knowledge or information sufficient to enable it to form a belief as to any of the desires plaintiff had as

alleged in said Paragraph III, other than its desire to acquire new machinery for bottling beer manufactured by plaintiff; denies that on or prior to the 14th [42] day of February, 1938, or at any other time, defendant made any of the representations averred in said Paragraph III, except the representation that defendant was a manufacturer of beer bottling machinery, including that described and having the trade names hereinabove set out.

II.

Answering Paragraph IV of the first count of said amended complaint, defendant denies each and every allegation therein contained, except as hereinafter alleged; alleges that on or about the 14th day of February, 1938, plaintiff and defendant made and entered into a certain written agreement, a true copy of which is hereunto annexed, marked Exhibit "A", and made a part hereof; for convenience in reference said agreement will be hereinafter referred to as "said contract Exhibit 'A'"; alleges that shortly thereafter, and prior to the shipment of any of the machinery described in said contract Exhibit "A", plaintiff informed defendant that it did not desire the Basement Extension described in said contract, and that such Basement Extension was not included in the machinery sold to plaintiff; alleges that "No. 516 Qt. Meyer-Dumore Bottle Cleaner", "40 Valve Meyer-Dumore Filler" and "Meyer Cataract Pasteurizer" were the respective trade names under which the machinery de-

scribed in said contract Exhibit "A" was sold; alleges that the net price of the machinery sold by defendant to plaintiff in and by said contract Exhibit "A" was Forty-one thousand eight hundred eighty and no/100 Dollars (\$41,880.00), and that said price was payable as in said contract provided, save and except that such method of payment was modified by the terms of that certain agreement executed by plaintiff and defendant on or about the 7th day of February, 1939, and dated December 6, 1938, a true copy of which agreement is hereunto annexed marked Exhibit "B" and [43] made a part hereof; for convenience in reference said last mentioned agreement will be hereinafter called "said contract Exhibit 'B'".

III.

Answering Paragraph V of the first count of said amended complaint, defendant denies each and every allegation therein made, except the allegation hereinafter quoted; alleges that defendant is without knowledge or information sufficient to enable it to form a belief as to the truth of the allegation contained in said Paragraph V reading:

"That plaintiff would not have entered into *said* for the purchase of said machinery, had it known (as hereinafter alleged) that said machinery would not do and perform the work as warranted by the defendant.";

denies that defendant warranted the machinery described in said contract Exhibit "A" otherwise

than in accordance with the guarantee set forth in said contract, and denies that said machinery at any time has failed to work in accordance with said guarantee.

IV.

Answering Paragraph VI of the first count of said amended complaint, defendant admits that on the 27th day of April, 1938, it shipped to plaintiff the machinery described in said contract, Exhibit "A" (exclusive of said Basement Extension) and furnished an engineer to supervise, and said engineer did supervise, the erection and installation of said machinery in plaintiff's brewery plant; denies each and every allegation made in said Paragraph VI, except as hereinabove expressly admitted; alleges that plaintiff has paid on account of the net purchase price of said machinery, to-wit: Forty-one thousand eight hundred eighty and no/100 Dollars (\$41,880.00), sums aggregating Thirty-three thousand four hundred [44] and no/100 Dollars (\$33,400.00) and no more, and that the balance of said purchase price, to-wit: Eight thousand four hundred eighty and no/100 Dollars (\$8,480.00), remains and now is unpaid from plaintiff to defendant, together with interest thereon at the rate of five per cent per annum from the 1st day of May, 1938.

V.

Answering Paragraph VII of the first count of said amended complaint defendant admits that fol-

lowing the installation of said machinery various parts thereof broke and became out of adjustment, thereby causing shut-downs in the operation of said machinery; alleges that said parts of said machinery broke and became out of adjustment because plaintiff failed to operate said machinery reasonably and in accordance with defendant's instructions, and defendant here refers to its Seventh Defense to said amended complaint hereinafter set forth and incorporates said Seventh Defense herein the same as if here set forth in full; except as hereinabove admitted or alleged, defendant denies each and every allegation contained in the following portion of said Paragraph VII:

“That ever since the installation of said machinery, and almost daily, various parts thereof broke and became out of adjustment, thereby causing shut-downs in the operation of said machinery, and by reason of said shut-downs and the failure of said machinery to properly work, and by reason of the misrepresentations of defendant made to plaintiff and inducing it to purchase said machinery, plaintiff has suffered damages as follows:”

(a) Answering subparagraph 1 of said Paragraph VII defendant alleges that it is without knowledge or information sufficient to enable it to form a belief as to the truth of the following allegations: [45]

“that the wages of said additional men per shift amounts to the sum of Twenty-Six Dollars and Twenty Cents (\$26.20); that said machinery has been operated Six hundred and fifty-seven (657) shifts, and plaintiff has thereby suffered damage in the operation of said six hundred fifty-seven (657) shifts in the total sum and amount of Seventeen Thousand, Ninety-Five Dollars and Fourteen Cents (\$17,095.14).

“Plaintiff further alleges that in the event that said machinery is in operation at the end of a period of five (5) years, from the date hereof (in accordance with the defendant’s representations as to the depreciation thereof), said machinery will have been operated for eight hundred and three (803) shifts, with three (3) additional men required, as hereinabove alleged, all to plaintiff’s damage in the further sum of Twenty Thousand, Eight Hundred and Eighty-Three (\$20,883.00) Dollars.”

denies each and every other allegation contained in said subparagraph 1.

(b) Answering subparagraph 2 of said Paragraph VII defendant admits that the pasteurizer sold by defendant to plaintiff is not self-cleaning, and in this behalf alleges that said pasteurizer will not function properly unless it is thoroughly cleaned at frequent intervals, and particularly unless the holes in the spray pans on said pasteurizer are

kept free from any obstruction, particularly obstructions caused by lime and other minerals deposited from the water used in the operation of said pasteurizer; alleges that defendant is without knowledge or information sufficient to enable it to form a belief as to the truth of the following allegations contained in said subparagraph 2:

“That from about the 16th day of June, 1938 to the 16th day of February, 1940, a total of 699.24 barrels of beer had to be dumped, under Government supervision, for the reason that the same was not fit to drink and unsalable, due to the improper [46] pasteurization thereof and the faulty cleansing of bottles, as hereinabove set forth. That the cost of said beer so dumped, exclusive of dumping labor, amounted to the sum of Four Thousand, Six Hundred and Ninety-Six Dollars and Twenty-Five Cents (\$4,-696.25), and thereby, by reason of the foregoing facts, plaintiff has been damaged in the sum of Four Thousand, Six Hundred and Ninety-Six Dollars and Twenty-five Cents (\$4,-696.25).

“That the barrels of beer dumped as aforesaid, constituted beer that did not leave the brewery premises, for the reason that plaintiff discovered that the same was spoiled before said beer was marketed.

“That during said period of time, a total of five thousand, two hundred and ninety-one (5,291) cases of beer, that was not fit for bev-

erage purposes and unsalable, by reason of the machinery's failing to properly pasteurize same, was, without any knowledge on the part of plaintiff of the fact that said beer was spoiled and unfit for beverage purposes, released and marketed by plaintiff to various of its customers. That when plaintiff became aware of the fact that said beer was totally unfit for beverage purposes, plaintiff was compelled to replace the same, and thereby suffered a total loss of said five thousand, two hundred and ninety-one (5,291) cases of beer. That thereby, plaintiff suffered loss and damage in the sum of Seven Thousand, Six Hundred and Sixty-Seven Dollars and Thirty-Seven Cents (\$7,667.37).

“That plaintiff has not yet made adjustments for all of the cases of beer that went into the hands of the trade, and alleges that for the replacement of said spoiled beer, plaintiff will suffer loss and damage in the sum of One Thousand (\$1,000.00) Dollars.”

denies each and every other allegation contained in said subparagraph 2, except as hereinabove expressly admitted. [47]

(c) Answering subparagraph 3 of said Paragraph VII defendant alleges that it is without knowledge or information sufficient to enable it to form a belief as to the truth of the allegations contained in said subparagraph 3.

(d) Answering subparagraph 4 of said Paragraph VII defendant denies each and every allegation therein contained, except the allegations hereinafter quoted, and alleges that defendant is without knowledge or information sufficient to enable it to form a belief as to the truth of the allegations contained in said subparagraph 4 reading as follows:

“That since January 1st, 1940, and up to the 30th day of September, 1940, said machinery has been operated two hundred and four (204) shifts. That it was necessary to use a total of five hundred (500) pounds of caustic soda per shift to increase the solution from a two and one-half ($2\frac{1}{2}\%$) percent solution to a six (6%) percent solution. That the cost of the excess caustic soda used during said period to increase said solution to a six (6%) per cent solution was Four Thousand, Five Hundred and Ninety (\$4,590.00) Dollars.”

(e) Answering subparagraph 5 of said Paragraph VII defendant denies each and every allegation therein contained, except the allegations hereinafter quoted, and alleges that defendant is without knowledge or information sufficient to enable it to form a belief as to the truth of the allegations contained in said subparagraph 4 reading as follows:

“That when a shut-down in the machinery occurs, the beer in the filler becomes warm, so that when the machinery is started up again, the

of February, 1939, was dated December 6, 1938, and that a true copy thereof is hereunto annexed, marked Exhibit "B", and made a part hereof; that said agreement will be hereinafter referred to as "said contract Exhibit 'B'"; that neither at the time of its execution of said contract, Exhibit "B", nor at any time prior thereto did plaintiff notify or inform defendant that plaintiff claimed said machinery was not working properly or that it was defective or that there was a breach of defendant's guarantee set forth in said contract Exhibit "A", or that plaintiff claimed that defendant was chargeable with any other warranty or representation, expressed or implied, relating to said machinery, or that plaintiff claimed a breach of any such other warranty or representation; that defendant would not have executed said contract Exhibit "B" or otherwise extended the time for the payment of the unpaid balance of the purchase price of said machinery had it known that plaintiff claimed any damages by reason of any alleged breach [50] of said guarantee set forth in said contract Exhibit "A", or by reason of any breach of any other warranty or representation claimed by plaintiff to have been made by defendant relating to said machinery.

III.

That by reason of the premises plaintiff is estopped from claiming any breach of said guarantee set forth in said Exhibit "A", or the breach

of any other warranty or representation claimed by plaintiff to have been made by defendant relating to said machinery.

Fifth Defense.

I.

Defendant here refers to Paragraphs I and II of its foregoing Fourth Defense to the first count of said amended complaint, and by such reference incorporates said paragraphs herein the same as if here set forth in full.

II.

That by the execution of said contract Exhibit "B" the sale by defendant to plaintiff of the machinery described therein was ratified, approved and confirmed, on the terms set forth in said contract Exhibit "A", save and except as the terms for the payment of the unpaid balance of the purchase price of said machinery were modified by said contract Exhibit "B", and that by its execution of said contract Exhibit "B", plaintiff waived any and all claims and complaints that said machinery was defective or was not working properly or that there was any breach of defendant's guarantee set forth in said contract Exhibit "A", or any breach of any other warranty or representation claimed by plaintiff to have been made by defendant relating to said machinery. [51]

beer foams over and is wasted and the bottles thereby are not maintained in the proper filling level.” [48]

(f) Answering subparagraph 6 of said Paragraph VII defendant denies each and every allegation therein contained.

(g) Answering subparagraph 7 of said Paragraph VII defendant denies each and every allegation therein contained, except the allegations hereinafter quoted, and alleges that defendant is without knowledge or information sufficient to enable it to form a belief as to the truth of the allegations contained in said subparagraph 7 reading as follows:

“That each and every shut-down occurring in the operation of said machinery has caused plaintiff to suffer damage in that the twenty-three (23) men required to operate said machinery could perform no labor whatsoever during the period said machinery was shut down, thereby causing a labor loss to plaintiff.”

Fourth Defense.

I.

That the installation in plaintiff's brewery plant of the machinery described in said contract Exhibit “A” was completed on or about the 9th day of June, 1938, and that plaintiff thereupon accepted said machinery and at all times thereafter plaintiff has been, and now is, using and operating said machinery; that plaintiff knew, or by the exercise of

reasonable diligence could have known, within a period of not more than thirty days following the installation of said machinery whether the same was defective and whether it failed to work properly in accordance with the guarantee set forth in said contract Exhibit "A", and whether it failed to perform the work for which it was designed and for which plaintiff purchased the same; that plaintiff paid each installment of the purchase price of said machinery as and when the same became due under said contract Exhibit "A" until said contract was modified [49] as hereinafter alleged.

II.

That in December 1938 after plaintiff had been continuously using and operating said machinery for more than five months, plaintiff requested defendant to extend the time stipulated in said contract Exhibit "A" for the payment of the unpaid balance of the purchase price of said machinery; that thereafter, and on or about the 7th day of February, 1939, defendant consented to an extension of time for the payment of said unpaid balance of the purchase price, and on or about said 7th day of February, 1939, plaintiff and defendant made and entered into a written agreement, whereby the terms of said contract Exhibit "A" were modified so as to enlarge the period for the payment of the unpaid balance of said purchase price; that said agreement so entered into on or about the 7th day

of February, 1939, was dated December 6, 1938, and that a true copy thereof is hereunto annexed, marked Exhibit "B", and made a part hereof; that said agreement will be hereinafter referred to as "said contract Exhibit 'B'"; that neither at the time of its execution of said contract, Exhibit "B", nor at any time prior thereto did plaintiff notify or inform defendant that plaintiff claimed said machinery was not working properly or that it was defective or that there was a breach of defendant's guarantee set forth in said contract Exhibit "A", or that plaintiff claimed that defendant was chargeable with any other warranty or representation, expressed or implied, relating to said machinery, or that plaintiff claimed a breach of any such other warranty or representation; that defendant would not have executed said contract Exhibit "B" or otherwise extended the time for the payment of the unpaid balance of the purchase price of said machinery had it known that plaintiff claimed any damages by reason of any alleged breach [50] of said guarantee set forth in said contract Exhibit "A", or by reason of any breach of any other warranty or representation claimed by plaintiff to have been made by defendant relating to said machinery.

III.

That by reason of the premises plaintiff is estopped from claiming any breach of said guarantee set forth in said Exhibit "A", or the breach

of any other warranty or representation claimed by plaintiff to have been made by defendant relating to said machinery.

Fifth Defense.

I.

Defendant here refers to Paragraphs I and II of its foregoing Fourth Defense to the first count of said amended complaint, and by such reference incorporates said paragraphs herein the same as if here set forth in full.

II.

That by the execution of said contract Exhibit "B" the sale by defendant to plaintiff of the machinery described therein was ratified, approved and confirmed, on the terms set forth in said contract Exhibit "A", save and except as the terms for the payment of the unpaid balance of the purchase price of said machinery were modified by said contract Exhibit "B", and that by its execution of said contract Exhibit "B", plaintiff waived any and all claims and complaints that said machinery was defective or was not working properly or that there was any breach of defendant's guarantee set forth in said contract Exhibit "A", or any breach of any other warranty or representation claimed by plaintiff to have been made by defendant relating to said machinery. [51]

Sixth Defense.

I.

That the installation in plaintiff's brewery plant of the machinery described in said contract Exhibit "A" was completed on or about the 9th day of June, 1938, and that plaintiff thereupon accepted said machinery and at all times thereafter plaintiff has been, and now is, using and operating said machinery; that plaintiff knew, or by the exercise of reasonable diligence could have known, within a period of not more than thirty days following the installation of said machinery whether the same was defective and whether it failed to work properly in accordance with the guarantee set forth in said contract Exhibit "A" and whether it failed to perform the work for which it was designed and for which plaintiff purchased the same.

II.

That plaintiff did not within a reasonable time after plaintiff knew, or by the exercise of reasonable diligence should have known, whether said machinery was defective and whether it failed to work properly in accordance with the guarantee set forth in said contract Exhibit "A", and whether said machinery failed to perform the work for which it was designed and for which plaintiff purchased the same, or at any time prior to the 24th day of February, 1939, give notice to defendant of any breach claimed by plaintiff of the guarantee set

forth in said contract Exhibit "A", or of any breach claimed by plaintiff of any other promise, representation or warranty, expressed or implied, alleged by plaintiff to have been made by defendant relating to said machinery.

Seventh Defense.

I.

That as aforesaid the installation in plaintiff's brewery [52] plant of the machinery described in said contract, Exhibit "A", was completed on or about the 9th day of June, 1938; that at the time of the installation of said machinery defendant gave plaintiff written and verbal instructions relative to the operation and maintenance of said machinery; that said machinery will not operate properly, and will become out of adjustment, unless it is operated reasonably and in accordance with said instructions, and defendant so stated to plaintiff at the time of installation of said machinery and from time to time thereafter; that included among the written instructions so given by defendant to plaintiff were those set forth in Exhibit "C" hereunto annexed and made a part hereof.

II.

That plaintiff did not follow said instructions set forth in said Exhibit "C" in the following, among other, respects:

1. That plaintiff failed to keep the soaking compartments of the bottle cleaner free from

old labels and other waste paper, and from time to time permitted said labels and waste paper to accumulate in said soaking compartments to the extent that the same clogged said bottle cleaner, thereby unreasonably increasing the drag or load upon the moving parts of said cleaner and causing them to become out of adjustment;

2. That plaintiff failed to keep the spindles, centering funnel bars, clamping funnels, funnel cups, supply jets and other parts of said bottle cleaner clean and free from lime and other minerals deposited thereon from the water used by plaintiff in its operations;

3. That plaintiff failed to keep the brushes on the bottle cleaner clean and failed to replace such brushes as the same became worn. [53]

4. That plaintiff failed to keep the pasteurizer clean and did not keep the perforations of the pans on the top of the pasteurizer free from lime and other minerals deposited thereon from the water used by plaintiff in its operations;

5. That plaintiff failed to keep the filler clean and free from sediment, and permitted the filling bowl and tubes to become clogged with sediment and dirt.

III.

That plaintiff changed the gears on the bottle cleaner so as to increase the speed thereof and

after such change of gears operated said bottle cleaner at an unreasonable speed, to-wit: at a speed higher than that at which said bottle cleaner was designed to operate.

IV.

That plaintiff failed to operate said machinery reasonably in that plaintiff permitted dirt, grime, sediment and lime, together with other mineral deposits from water, to accumulate on the operating parts of said machinery; that such accumulation of grime, dirt, lime and other mineral deposits placed a heavy and unreasonable load or drag on said machinery, and thereby prevented the moving parts thereof from functioning properly and caused some of such parts to break and others to become out of adjustment; that plaintiff continued to operate said machinery while so out of adjustment and that such operation of said machinery while out of adjustment further impaired the utility thereof.

V.

That any failure of said machinery to work properly and any breakage or maladjustment of any parts thereof were caused solely and exclusively by reason of plaintiff's failure, as hereinabove alleged, to maintain and operate said machinery reasonably and in [54] accordance with defendant's instructions.

Eighth Defense.

That all and singular the damages alleged in plaintiff's amended complaint are special damages

claimed to have been sustained as a consequence of the operation of said machinery, and that in and by the terms of said contract, Exhibit "A", it is expressly provided that defendant shall not be liable for any such special or consequential damages. [55]

**Answer to Second Count (Second Cause of Action)
of Amended Complaint**

First Defense.

That the second count (second cause of action) set forth in said amended complaint fails to state a claim against defendant upon which relief can be granted.

Second Defense.

That the right of action set forth in the second count (second cause of action) of said amended complaint did not accrue within two (2) years next before the commencement of this action, and is barred by the provisions of Subdivision 1 of Section 339 of the Code of Civil Procedure of the State of California.

Third Defense.

I.

Answering Paragraph II of said second count of said amended complaint defendant denies each and every allegation therein contained, except as hereinafter alleged; alleges that on or about the 14th day of February, 1938, plaintiff and defendant made and entered into a certain written agree-

ment, a true copy of which is hereunto annexed, marked Exhibit "A" and made a part hereof; for convenience in reference said agreement will be hereinafter referred to as "said contract Exhibit 'A' "; alleges that shortly thereafter and prior to the shipment of any of the machinery described in said contract Exhibit "A", plaintiff informed defendant that it did not desire the Basement Extension described in said contract Exhibit "A", and that such Basement Extension was not included in the machinery sold to plaintiff; alleges that "No. 516 Qt. Meyer-Dumore Bottle Cleaner", "40 Valve Meyer-Dumore Filler" and "Meyer Cataract Pasteurizer" were the respective trade names under which the machinery described in said contract Exhibit "A" was sold; alleges that the net price of the machinery sold to plaintiff by defendant under [56] the terms of said contract Exhibit "A" was Forty-one thousand eight hundred eighty and no/100 (\$41,880.00), and that said purchase price was payable as in said contract provided, save and except that such method of payment was modified by the terms of that certain agreement executed by plaintiff and defendant on or about the 7th day of February, 1939, and dated December 6, 1938, a true copy of which agreement is hereunto annexed marked Exhibit "B" and made a part hereof; for convenience in reference said last mentioned agreement will be hereinafter called "said contract Exhibit 'B' ".

II.

Answering Paragraph III of the second count of said amended complaint defendant denies each and every allegation therein contained, except that defendant admits it made the guarantee set forth in said contract, Exhibit "A".

III.

Answering Paragraph IV of the second count of said amended complaint defendant denies each and every allegation therein contained, except as hereinafter alleged; alleges that on or about the 7th day of February, 1939, plaintiff and defendant executed said contract Exhibit "B".

IV.

Answering Paragraph V of the second count of said amended complaint defendant here refers to Paragraphs III, IV and V of the Third Defense of its foregoing answer to the first count set out in said amended complaint and by such reference incorporates said Paragraphs herein the same as if here set forth in full.

V.

Answering Paragraph VI of the second count of said amended complaint defendant denies each and every allegation therein contained; defendant here refers to the Seventh Defense of its fore- [57]
going answer to the first count set out in said amended complaint and by such reference incorpo-

rates said Seventh Defense herein the same as if here set forth in full.

Fourth Defense.

Defendant here refers to the Fourth Defense of its foregoing answer to the first count set forth in said amended complaint and by such reference incorporates said Fourth Defense herein the same as if here set forth in full.

Fifth Defense.

Defendant here refers to the Fifth Defense of its foregoing answer to the first count set forth in said amended complaint and by such reference incorporates said Fifth Defense herein the same as if here set forth in full.

Sixth Defense.

Defendant here refers to the Sixth Defense of its foregoing answer to the first count set forth in said amended complaint and by such reference incorporates said Sixth Defense herein the same as if here set forth in full.

Seventh Defense.

Defendant here refers to the Eighth Defense of its foregoing answer to the first count set forth in said amended complaint and by such reference incorporates said Eighth Defense herein the same as if here set forth in full. [58]

COUNTERCLAIM

Plaintiff owes defendant Two thousand three hundred three and 89/100 Dollars (\$2,303.89), according to the account, copy of which is hereunto annexed, marked Exhibit "D" and made a part hereof.

Wherefore, defendant prays that plaintiff take nothing by its complaint and that defendant have judgment against plaintiff for the sum of Two thousand three hundred three and 89/100 Dollars (\$2,303.89), together with interest thereon at the rate of seven per cent (7%) per annum from the date of the filing of this answer, for defendant's costs of suit herein and for such other and further relief as may be meet and proper in the premises.

LAWLER, FELIX & HALL,

MAX FELIX,

WILLIAM T. COFFIN,

By WILLIAM T. COFFIN,

Attorneys for Defendant.

[59]

EXHIBIT "A"

[Printer's Note: Exhibit "A" is identical with Exhibit "A" attached to the Complaint set out at page 8 of this printed record and is here omitted to avoid duplication.]

EXHIBIT "C"

I.

Instructions for Operating the
Meyer-Dumore Bottle Cleaner.

Cleaning Tanks:

The frequency of cleaning depends a great deal on the size of labels and amount of labels, and also somewhat on the kind of paste used. The only reason for cleaning is to remove labels and dirt, and as caustic soda is expensive, the solution should be used as long as possible without cleaning. Individual experience will best determine this. In general, the first three compartments should be cleaned every 48 to 60 hours run, and the fourth compartment or fresh water tank should be cleaned daily.

Outside Brushing Mechanism:

This device is intended to lift the bottles out of the carriers, revolve them and raise them between two brushes which scrub the bottle downward while they are going up and down, with a spray of water to assist in removing any dirt or particles of labels which remain on the bottles. It is very important that this water used for the outside brushes and the first rinse is not colder than 80° F. nor warmer than 90° F. This water is preheated in the space between the two last compartments and also by a mixing column which has a long valve stem that regulates the steam supply by expansion and contraction.

The spindles should turn and slide freely through

the lifter spindle guide and should be kept free from any deposit which should cause them to stick. The centering funnel bar above these spindles should also be kept free from dirt and scale so that all bottles will slide down easily. In case bottles are found on [72] top of the carriers at any time, this is caused by trouble at this point. The brushes also should be kept revolving rapidly so as to bring down the bottles and prevent them hanging up as would be the case if the brushes remain standing. The outside brushes should be adjusted so as to scrub the bottles thoroughly, and should be replaced every six months or a year, as they wear out.

All supply jets and rinsers and outside brushes must be kept clean.

Bottle lifter spindles must be kept free of lime and also free of oil or grease of any kind.

Inside Brushing Mechanism:

On the brushing mechanism, the glass should not be permitted to remain in the funnel cups and a stick should be kept handy to jar down the funnel cups from the top when a brush or a bottle breaks so that all the particles of glass will be jarred out. Any particle of glass remaining in funnel cup is bound to injure the brush, bottle or tube.

Labels and other dirt should be kept away from centering funnels and at the bottle lifting device so as to permit the proper centering of the bottles.

Examine brushes daily and replace worn or cut brushes. Greasy brushes indicate too weak a solu-

tion; wash with soap powder. See that water passage is clear through brush tips.

Funnel cups must be kept free of lime and work freely. If lime accumulates, use muriatic acid to remove.

Rinsing Device:

When the machine is first started there is usually more or less dirt and scale in the pipes which obstruct the holes near the ends of the pipes. Plugs are provided here which should be removed occasionally until this scale and dirt is [73] eliminated and a small wire should be kept convenient to make sure that all openings are clear. All rinsers are made visible so that an attendant can easily see whether each and every stream is operating properly.

There should be at least 15 pounds water pressure on the rinsing line and if this pressure is not available a booster pump should be used.

In case the water supply is not clean or is likely to cause frequent obstructions, a strainer or fish trap or some other form of filter should be provided.

All supply jets and rinsers and outside brushes must be kept clean. [74]

II.

Instructions for Operating the Meyer Cataract Pasteurizer.

When your machine was built, the interior was given a primer coat of a special aluminum paint

with a Bakelite base and a second coat of Tropelite. This coating is not attacked by acid or alkali and is used to prevent the tank and other parts from rusting. When this coating becomes damaged and rust spots show up, it is advisable to wire brush and clean these spots down to clean metal and patch these spots with aluminum paint and Tropelite. It would be good insurance to give the entire machine a complete cleaning and paint job each year. This applies especially to the interior. Our reason for using the aluminum paint for primer is that it brightens the interior, otherwise the regular A.C.B. primer for Tropelite can be used.

While the spray pans are punched with self-cleaning holes, they should be cleaned after each run and thoroughly brushed to remove all sediment. We formerly used small trap doors in pans to clean out sediment. We discontinued these so all sediment is removed from machine so it would not be re-pumped into pans.

After one week of operation the tank should be drained and cleaned thoroughly. The hand hole covers in pump trough or canal should be removed and trough thoroughly cleaned and hosed out. [75]

III.

Instructions for Operating Meyer-Dumore Filler.

Cleaning After Running on Beer:

After completion of the day's run the machine should be thoroughly cleaned. Remove the nuts hold-

ing the bowl cover in place and remove the cover using the lift mechanism supplied for this purpose. Thoroughly wash out the bowl using plenty of cold water permitting the water to drain out thru the liquid supply line. After this has drained for several minutes, close the beer cock filling up the bowl to the top. Then move all valve levers to the open position permitting the water to drain out thru all the valves, both thru the liquid valves and thru the charge valves, supplying sufficient water to maintain the level above the charge valves. Allow water to drain for at least five minutes.

Next attach the snift valve cleaner fitting to the cold water hose and apply to each of the snifts, in turn allowing the water to flush thru for at least 1 minute.

The gauge lines on the bowl pressure and line pressure gauge are supplied with cleanout fittings so that beer trapped in the gauge lines can be flushed out. This can be conveniently done by applying the snift cleaning fitting to these cleanout fittings, again using cold water.

Attach snift valve cleaner to hose and clamp in position on each stirrup the same as bottle, and open up valve, flushing water backward thru screen and beer valve.

Possible Operating Difficulties and Their Remedy:

1. Liquid does not flow into bottles properly (all valves performing similarly). [76]

(a) Check liquid level in bowl. An extremely high level in the bowl or an extremely low level will cause slow filling or complete failure to flow.

2. Rate of filling varies on different valves.

(a) Accumulating of filter mass or other foreign material on the valve screen may restrict the flow of liquid thru the valve.

(b) Valve lever shaft or inside operating lever may have been bent thru abuse or mishandling so that bottle may not be charged properly or so that valve shifter when properly adjusted for undamaged valves closes one valve too much. This defect will also be apparent in the "blow-off" making this particular valve fail to blow off.

3. Bottle foams when lowered from sealing rubber.

(a) This is usually due to a clogged snift valve. A clogged snift can be detected by watching the submerged end of the charge tube at the instant when snifting occurs. If the snift is open a few small bubbles will appear. If clogged apply snift cleaner fitting. If this does not clear passage remove nut, valve, and spring and clean with #60 drill. After using drill re-assembly and use snift cleaner fitting.

(b) Foaming is frequently caused by wild beer and excessive carbonation. The Meyer Dumore filler, due to the principle of filling, releases very little gas in the actual filling operation, so that somewhat less carbonation is nec-

essary on beer being filled on this filler than on beer [77] being filled on other fillers. A test of the finished bottled product should be made so that carbonation is reduced to the minimum which will give the desired volumetric gas content in the finished product.

4. One head fails to fill.

(a) Sealing rubber may be damaged so that proper seal cannot be made between bottle top and head. Under this condition counter-pressure will not be established.

5. One head fills bottles too high.

(a) A small leak in the sealing rubber joint, or snift valve will permit air to escape from bottle after the vent tube holes have been reached by the beer. This defect does not show up as a rule except if machine is shut down with the defective head having a bottle in place in the filling position.

6. Bowl floods.

(a) Usually due to insufficient pressure on gauge #2.

(b) Flooding of the bowl may result from stopping the machine either when the valve is in the "mid blow off position" or in the charge position with the power off at the instant when the valve lever is to press the electric latch. Either of these conditions will cause less counter-pressure and result in flooding the bowl.

7. Liquid level drops in bowl.

(a) This is usually due to gummy substance clog- [78] ging the relief valve opening. On machine equipped with the flood in the cover, the passage can easily be cleaned out by inserting a wire in the top opening of the pet cock. This is also a point that should be flushed with water at night and cleaned. [79]

EXHIBIT "D"

ACCOUNT OF GEO. J. MEYER MANUFACTURING CO.
with
MONARCH BREWING COMPANY.

Date.	Number.	Description.	Charges.	Credits.
1938.				
May 2	18051	PPD Frt chgs on HP719	138.05	
May 12	38929aS		260.00	
Jun. 8	40241aS		.57	
Jun. 22	40889aS		16.50	
July 7	41502aS		4.96	
July 15	41876aS		86.00	
July 16	Credit	7850RA your inv. 7/9/38 Coll. chg etc. Rec. exp.		6.35
Aug. 2	36317aS		15.87	
Aug. 9	43011aS		7.64	
Aug. 30	J6958	Trans. from temp sundry a/c in b/d cr 8003 8/3		.57
Sep. 7	44468aS		38.00	
Sep. 8	44531aS		3.60	
Sep. 26	45298aS		9.50	
Oct. 1	45296aS	9/27	.43	
Oct. 1	45415aS	9/30	32.53	
Oct. 7	Credit	8353RA 45298 B1205		9.50
Nov. 3	46788aS		85.33	
Nov. 9	Credit	8528RA Western Indust Engr 5/26/38 Inv. G676 forward		174.47
			\$ 702.98	\$ 190.89

George J. Meyer Mfg. Co.

77

Date.	Number.	Description.	Charges.	Credits.
1938.		forward	\$ 702.98	\$ 190.89
Nov. 10	47911aS		70.74	
Nov. 12	46891aS		5.87	
Nov. 15	47107aS		15.00	
Nov. 18	47255aS		16.37	
Nov. 21	47353aS		4.50	
Dec. 1	47771aS		94.75	
Dec. 3	47858aS		9.33	
Dec. 23	48596aS		11.22	
1939.				
Jan. 18	49521aS		2.19	
Jan. 21	49667aS		2.00	
Jan. 27	Credit	8934RA allow inv. L.A. Automotive wks 6/22/38 B1205		12.00
Jan. 31	D/M6124	1/7 26 hrs welding at 2.50	65.00	
Feb. 2	Credit	8973RA 47353 B1205		4.50
Feb. 8	50347aS		15.87	
Feb. 28	Cash			384.70
Mar. 1	Credit	9119RA 36317 HP719		15.87
Mar. 3	51072aS		41.75	
Mar. 27	52182aS		1.99	
Apr. 6	52626aS		8.30	
Apr. 8	52732aS		4.05	
Apr. 12	52821aS		27.69	
Apr. 19	53199aS		21.00	
		forward	<hr/> \$1,120.60	<hr/> \$ 607.96
				[82]

Date.	Number.	Description.	Charges.	Credits.
1939.		forward	\$1,120.60	\$ 607.96
Apr. 25	53437aS		29.00	
Jun. 1	54406aS		Cancelled	
Jun. 9	37556A		94.00	
Jun. 13	55723aS		5.03	
Jun. 24	56344aS		67.20	
Jun. 26	56736aS		22.09	
Jun. 30	Credit	9885RA 55723 HP719		120.03
July 12	57163aS		7.39	
July 13	57262aS		12.00	
July 17	57534aS		.60	
July 21	57535aS		12.50	
July 25	58034aS		9.72	
July 26	58044aS		37.38	
July 18	37677A	Billed on 12723M		
July 3	37646A		40.31	
Aug. 2	58392aS		62.14	
Aug. 14	37781A		62.00	
Aug. 17	59206aS		38.79	
Aug. 23	59459aS		21.00	
Aug. 22	Cash			243.76
Aug. 24	59458aS		49.66	
Aug. 31	Cash & Disc. 78			38.79
Sep. 1	59803aS	8/31	2.00	
Sep. 14	60364aS		100.80	
Oct. 1	60594aS	9/27	Cancelled	
Oct. 7	61646aS		5.81	
		forward	\$1,800.02	\$1,010.54

[83]

Date.	Number.	Description.	Charges.	Credits.
1939.		forward	\$1,800.02	\$1,010.54
Nov. 11	63106aS		72.00	
Nov. 14	63178aS		3.88	
Nov. 17	63343aS		100.00	
Dec. 1	64137aS		38.25	
Dec. 9	64070aS	11/30	36.50	
Dec. 6	64340aS		22.00	
Dec. 21	64706aS		80.00	
Dec. 22	64282aS		33.78	
Dec. 22	64339aS		6.25	
Dec. 22	64701aS		30.00	
Dec. 23	64702aS		5.46	
1940.				
Jan. 17	65442aS		44.75	
Jan. 23	65912aS		30.23	
Feb. 1	66130aS	1/6	35.49	
Feb. 16	Credit	10930RA 13536 STS1s		60.75
Feb. 13	67097aS		7.80	
Feb. 22	67096aS		1.99	
Mar. 4	67540aS		5.00	
Mar. 20	Eng. Ser	685 DS AR CS7051	205.71	
Mar. 20	Eng. Ser	686 ABR CS7080	47.50	
Mar. 21	Eng. Ser	687 ABR CS7152	34.70	
Apr. 1	68902aS	3/13	22.00	
Apr. 2	69304aS		22.00	
Apr. 8	Credit	10313GR 63343GR		99.65
Apr. 9	69091aS		50.40	
		forward—	\$2,735.71	\$1,170.94
				[84]

Date.	Number.	Description.	Charges.	Credits.
1940.		forward—	\$2,735.71	\$1,170.94
Apr. 9	69092aS		3.90	
Apr. 9	69093aS		15.00	
Apr. 12	69270aS		10.68	
Apr. 8	69564aS		2.50	
Apr. 27	70016aS		22.28	
Apr. 30	Cash & Disc. 21			10.68
May 1	70513aS	4/29	103.60	
May 15	70390aS		101.75	
May 15	71109aS		61.62	
May 18	Eng. Ser	1150 GCS CS7075	200.00	
May 18	Eng. Ser	1151 ABR CS7212	33.46	
May 21	70618aS		103.05	
June 20	Eng. Ser	1264 ABR CS7441	12.98	
June 25	Cash			11.64
June 28	Cash			23.69
June 28	Cash COD			20.00
June 29	Cash COD			4.15
June 20	72592aS	COD	4.15	
June 20	72623aS	COD	20.00	
June 26	72869aS	COD	15.95	
July 1	73098aS	6/20	11.64	
July 1	73097aS	6/22	23.69	
July 10	73584		15.00	
July 9	Cash COD			15.95
Aug. 1	74996aS	7/15	11.00	
Aug. 1	73943aS	7/29 COD	93.25	
forward—			\$3,606.21	\$1,257.06

[85]

Date.	Number.	Description.	Charges.	Credits.
1940.		forward—	\$3,606.21	\$1,257.05
Aug. 1	Eng. Ser	1479ES CS7643 ABR	17.81	
Aug. 8	39074A	COD	60.00	
Aug. 9	74800aS	COD	201.50	
Aug. 13	Cash	COD		93.25
Aug. 20	Cash	COD		60.00
Aug. 29	Cash			201.50
Sep. 1	75770aS	8/29 COD	122.50	
Sep. 4	76451aS	COD	11.58	
Sep. 5	Eng. Ser.	1646ES CS7718 ABR	32.17	
Sep. 9	Cash			122.50
Sept. 13	Cash	COD		11.58
Sept. 28	77546aS	COD	58.00	
Oct. 7	77946aS	COD	68.00	
Oct. 7	Credit	121RA 71109AS HP719		2.00
Oct. 16	78055aS	COD	82.15	
Oct. 11	Cash	BC		58.00
Oct. 19	Cash	BC		68.00
Oct. 29	Cash	COD		82.15
			<u>\$4,259.92</u>	<u>\$1,956.03</u>
Total Charges			\$4,259.92	
Less Credits			1,956.03	
Balance Due			<u>\$2,303.89</u>	

[Endorsed]: Answer to amended complaint and counterclaim. Filed Jan. 31, 1941. [86]

[Title of District Court and Cause.]

MOTION OF DEFENDANT FOR SUMMARY JUDGMENT.

Defendant moves the Court for summary judgment in its favor as to each and every claim as-

serted against defendant in and by plaintiff's amended complaint herein, on the following grounds:

1. That the pleadings on file, including plaintiff's original complaint, show there is no genuine issue as to the following material facts:

(a) The agreement between plaintiff and defendant relating to the machinery in question was reduced to writing and completely expressed in the written contract dated February 14, 1938, copy of which is annexed to plaintiff's original complaint as Exhibit "A" thereof, and further copy of which is annexed to defendant's answer to the amended complaint as Exhibit "A" thereof, as such contract was supplemented by the written agreement dated December 6, 1938, copy of which is annexed to defendant's answer to the amended complaint as Exhibit [88] "B" thereof;

(b) In both the original and supplemental contracts it is expressly provided that no verbal understanding is binding unless specified therein;

(c) It is further expressly provided in both the original and supplemental contracts that defendant shall not be liable for any damages or consequential damages incident to the operation of the machinery in question;

(d) The damages claimed to have been sustained by plaintiff, and itemized in plaintiff's amended complaint, are damages or consequen-

tial damages incident to the operation of the machinery in question.

2. That by virtue of the facts aforesaid, defendant is entitled as a matter of law to a judgment in its favor as to each and every claim asserted by plaintiff in its amended complaint herein.

LAWLER, FELIX & HALL,
MAX FELIX,
WILLIAM T. COFFIN,
By WILLIAM T. COFFIN.
Attorneys for Defendant.

NOTICE OF HEARING OF MOTION.

To the Plaintiff above named, and to Alfred F. MacDonald, Esquire, its attorneys:

Please take notice that the undersigned will bring the foregoing motion on for hearing before this Court in Courtroom No. [89] 5 in the United States Post Office and Courthouse Building, Los Angeles, California, on the 25th day of August, 1941, at the hour of 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel may be heard.

Dated this 9th day of August, 1941.

LAWLER, FELIX & HALL,
MAX FELIX,
WILLIAM T. COFFIN,
By WILLIAM T. COFFIN.
Attorneys for Defendant.

[Endorsed]: Filed Aug. 9, 1941. [90]

At a stated term, to wit: The September Term, A. D. 1941, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Wednesday the 8th day of October in the year of our Lord one thousand nine hundred and forty-one.

Present: The Honorable Leon R. Yankwich, District Judge.

[Title of Cause.]

This cause having heretofore been submitted for decision on the motion of the defendant for summary judgment, the Court now enters the following order:

The motion of the defendant for summary judgment in its favor as to each and every claim asserted against the defendant by the plaintiff's Amended Complaint, filed August 9, 1941, heretofore argued and submitted, is now decided as follows:

The said motion is hereby granted upon the ground that by the terms of the contract of sale of the machinery, dated February 14, 1938, the plaintiff waived the damages it now seeks to recover.

[92]

[Title of District Court and Cause.]

MEMORANDUM DECISION

The Motion of the Defendant for summary judgment in its favor as to each and every claim asserted against the defendant by the plaintiff's Amended Complaint, filed August 9, 1941, heretofore argued and submitted, is now decided as follows:

The said motion is hereby granted upon the ground that by the terms of the contract of sale of the machinery, dated February 14, 1938, the plaintiff waived the damages it now seeks to recover.

The Court is of the view that the phrase "damages or consequential damages" in the waiver clause of the contract is used to cover all damages general or special, that might result in the "shipment, erection or the operation" of the machinery. (See, *Luitweiler Pumping Engine Co. v. Ukiah Water & Improvement Co.*, 1911, 16 C. A. 198, 209; 25 C. J. S., *Damages*, #2, p. 455) To limit the waiver to the words "consequential damages", and, then, to interpret the words "consequential damages" as some condemnation cases do, (see cases below) as "those which are attributable to the interposition of some independent cause other than the acts of the defendant"—(to quote the language of counsel for plaintiffs in their last letter-memorandum)—would render the waiver clause meaningless. For, if consequential damages be those caused by other parties, no liability can attach to the defendant on account

of them. And, clearly, to interpret the contract of the parties as waiving damages for which the defendant would not, under any circumstances be liable,—they being caused by the acts of others,—would do violence [93] to the rule which bids us to interpret contracts so as to give them meaning rather than to make them meaningless. When parties contract, they do not protect themselves against liabilities which are not theirs, but which spring from the acts of others. They seek to avoid liability which would flow from their own acts. And so did the parties here. And neither the rule of ejusdem generis nor the special meaning given to the words “consequential damages” in some federal condemnation cases, such as *United States v. Chicago B & Q Ry. Co.*, 7 Cir., 1937, 90 F(2) 161, 166-169; *United States v. Chicago B & Q Ry. Co.*, 8 Cir., 1936, 82 F(2) 131, 136-137) call for an interpretation which would destroy entirely the meaning of the word “damages” as used in the waiver.

Hence the ruling above noted.

Dated this 8th day of October, 1941.

Appearances:

For the Plaintiff:

Alfred F. MacDonald and
Bodkin, Breslin & Luddy
Los Angeles, California

For the Defendant:

Lawler, Felix & Hall
Los Angeles, California

[Endorsed]: Filed Oct. 8, 1941. [94]

DOCKET—UNITED STATES DISTRICT COURT

Docket 1035-Y	Title of Case	Attorneys
		For Plaintiff:
	Monarch Brewing Com- pany, a corporation,	Alfred F. MacDonald Bodkin, Breslin & Luddy
	vs	
	Geo. J. Meyer Manufac- turing Co., a corpora- tion	For Defendant: Lawler, Felix & Hall

Date	Filings-Proceedings
	ENTRY OF OCT. 8. 1941
Oct. 8 1941	Ent. order grtg. defts. mo. for summary judg- ment. Notified Attys. Fld. memo. decision. * * * * *
	ENTRY OF OCT. 13, 1941
Oct. 13, 1941	Fld. & ent. judgment pltf. take nothing & deft. have costs. D & I Judgt. Entered at C. O. B. 7, page 94. Notified Attys. * * * * *

[95]

In the District Court of the United States,
Southern District of California,
Central Division.
No. 1035-Y Civil.

MONARCH BREWING COMPANY, a corpora-
tion,

Plaintiff,

vs.

GEORGE J. MEYER MANUFACTURING
COMPANY, a corporation,

Defendant.

JUDGMENT ON PLAINTIFF'S CLAIMS.

The defendant, George J. Meyer Manufacturing Company, a corporation, having filed herein on the 9th day of August, 1941, its written motion for summary judgment in its favor as to each and every claim asserted against the defendant by the plaintiff, Monarch Brewing Company, a corporation, in and by plaintiff's amended complaint herein, and said motion having come on regularly for hearing before the above entitled Court and the Honorable Leon R. Yankwich, Judge thereof, on the 29th day of September, 1941, Alfred F. MacDonald, Esquire, and Messrs. Bodkin, Breslin & Luddy, by E. E. Hitchcock, Esquire, appearing for the plaintiff, and Messrs. Lawler, Felix & Hall, Max Felix, Esquire and William T. [96] Coffin, Esquire, by William T. Coffin, Esquire, appearing for the defendant, and photographic copies of the two written contracts between the plaintiff and the defendant, dated respectively February 14, 1938, and December 6, 1938, having been received in evidence pursuant to stipulation of counsel, and the Court, after hearing the arguments of counsel, having taken the matter under submission, and thereafter, being fully advised in the premises, having filed herein its memorandum decision, dated the 8th day of October, 1941, granting said motion:

It is, therefore, ordered, adjudged and decreed that the plaintiff take nothing by its action against the defendant, and that the defendant have and recover from the plaintiff defendant's costs herein, taxed in the sum of \$44.40.

Dated this 11th day of October, 1941.

LEON R. YANKWICH

United States District Judge.

Approved as to form in accordance with Rule 8,
this 10 day of October, 1941.

ALFRED F. MacDONALD,

BODKIN, BRESLIN & LUDDY,

By E. E. HITCHCOCK,

Attorneys for Plaintiff.

[Endorsed]: Judgment entered Oct. 13, 1941.
Docketed Oct. 14, 1941. Book 7, Page 94. R. S.
Zimmerman, Clerk, By Louis J. Somers, Deputy.

[97]

Receipt is acknowledged of copy of the within
Judgment On Plaintiff's Claims this 10th day of
October, 1941, at the hour of 11 A.M. of said day.

ALFRED F. MacDONALD,

BODKIN, BRESLIN & LUDDY.

By E. E. HITCHCOCK

Attorneys for Plaintiff.

[Endorsed]: Filed Oct. 13, 1941. [98]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Monarch Brewing
Company, a corporation, plaintiff in the above en-

titled action, hereby appeals to the Circuit Court of Appeals of the Ninth Circuit, from the final judgment on plaintiff's claim, entered in this action on October 13, 1941.

Dated: January 13, 1942.

ALFRED F. MacDONALD

BODKIN, BRESLIN & LUDDY

By G. STUART SILLIMAN

Attorneys for Plaintiff.

[Endorsed]: Filed and mailed copy to Atty. for deft. Jan. 13, 1942. R. S. Zimmerman, Clerk, by Edmund L. Smith, Deputy. [100]

[Title of District Court and Cause.]

COST BOND ON APPEAL

Whereas, the Plaintiff in the above entitled action is about to appeal to the United States Circuit Court of Appeals, Ninth Circuit, from a judgment entered against it in said action, in said United States District Court, Southern District of California, Central Division, in favor of the Defendant in said action, on the 13th day of October, 1941.

Now, therefore, in consideration of the premises, and of such appeal, the undersigned, American Surety Company of New York, a corporation organized and existing under the laws of the State of New York, and duly authorized to transact a general surety business in the State of California, does

undertake and promise on the part of the appellant, that the said appellant will pay all damages and costs which may be awarded against it on the appeal, or on a dismissal thereof, not exceeding the sum of two hundred fifty dollars (\$250.00), to which amount it acknowledges itself bound.

In witness whereof, the corporate seal and name of the said Surety Company is hereto affixed and attested at Los Angeles, California, by its duly authorized officers, this 13th day of January, 1942.

In case of a breach of any condition hereof, the above-entitled Court may, upon notice to said American Surety Company of New York, Surety hereunder, of not less than ten days, proceed summarily in the above-entitled action or proceeding to ascertain the amount which said Surety is bound to pay on account of such breach and render judgment against said Surety and award execution therefor.

AMERICAN SURETY COMPANY
OF NEW YORK

By A. E. KRULL

Resident Vice President

Attest:

I. TAYLOR

Resident Assistant Secretary

10.00

State of California,
County of Los Angeles—ss.

On this 13th day of January, A. D. 1942, before me, Lucile M. Chesley, a Notary Public in and for

Los Angeles County, State of California, residing therein, duly commissioned and sworn, personally appeared A. E. Krull personally known to me to be the Resident Vice-President and I. Taylor personally known to me to be the Resident Assistant Secretary of the American Surety Company of New York, the Corporation described in and that executed the within instrument on behalf of the Corporation therein named, and acknowledged to me that such Corporation executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year in this Certificate first above written.

[Seal] LUCILE M. CHESLEY

Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires April 16, 1945.

[Endorsed]: Filed Jan. 13, 1942. [102]

[Title of District Court and Cause.]

STATEMENT OF POINTS RELIED UPON BY
PLAINTIFF ON APPEAL

I.

By virtue of the rule of ejusdem generis, the phrase "damages or consequential damages" contained in the waiver clause of the contract sued upon, the only damages waived by the terms of such clause are consequential damages, and the trial

court erred in failing to limit the waiver clause to such consequential damages.

II.

Consequential damages are those which are special rather than general, and are caused by the concurrence of some other event attributable to the same origin and cause, that is, attributable to the negligent act of defendant, so continuous in its nature that the concurrent wrongful act which precipitated the damage will not be deemed an independent wrong, but as conjoining with the original act of defendant in creating the disastrous result. Therefore the court erred in holding that the waiver clause in question waived claims for all recoverable damages.

III.

The court erred in failing to find that the parties had placed such a practical construction on the contract by their [103] conduct as to require the court to hold that the waiver contained in the contract would not bar plaintiff's action for the damages here sought to be recovered.

IV.

The plaintiff's action is not barred by the Statute of Limitations or laches, it having retained the machinery at defendant's request, in order to afford the defendant an opportunity to place the machinery in such working order as to comply with defendant's representations and plaintiff's requirements, and plaintiff having deferred the commence-

ment of its action in reliance upon defendant's representations that it would place the machinery in such working order as to comply with defendant's representations and plaintiff's requirements.

V.

Surrounding circumstances upon which an implied warranty is predicated may be shown by parol testimony notwithstanding the contract was reduced to writing and contained a statement that the parties were not bound by any verbal understanding, the contract not having contained a detailed statement of the warranty.

VI.

The waiver contained in the contract and relied upon by the defendant is repugnant to the preceding clause expressly guaranteeing the working of the machinery, and hence the former clause contained in the guaranty must be deemed to be controlling and the subsequent inconsistent waiver rejected.

Respectfully submitted,

ALFRED F. MacDONALD

BODKIN, BRESLIN & LUDDY

By G. STUART SILLIMAN

Attorneys for Plaintiff

[Endorsed]: Received copy of the within Statement of Points this 16th day of January, 1942.
/s/ Lawler, Felix & Hall, Attorneys for Defendant.
Filed Jan. 19, 1942. [104]

[Title of District Court and Cause.]

DESIGNATION OF PORTION OF RECORD
DESIRED BY PLAINTIFF ON APPEAL

To the Clerk of the Above Entitled Court:

Please prepare and certify Transcript of the Record on Appeal to the United States Circuit Court of Appeals, for the Ninth Circuit, consisting of the following:

1. Plaintiff's Amended Complaint for damages for breach of warranty.
2. Answer to Amended Complaint.
3. Motion of defendant for summary judgment.
4. Memorandum Decision.
5. Judgment on plaintiff's claim.
6. Cost bond on appeal.
7. Statement of points relied upon by appellant.
8. Designation of portion of record desired by plaintiff on appeal.
9. Petition for Removal.
10. Bond on Removal.
11. Order on Removal.
12. Notice of appeal.

Dated: January 14, 1942.

ALFRED F. MacDONALD

BODKIN, BRESLIN & LUDDY

By G. STUART SILLIMAN

Attorneys for Plaintiff

[Endorsed]: Received copy of the within Designation of Portion of Record, etc. /s/ Lawler, Felix & Hall, Attorneys for Defendant. Filed Jan. 19, 1942. [105]

[Title of District Court and Cause.]

APPELLEE'S DESIGNATION OF ADDITIONAL PORTIONS OF RECORD TO BE INCLUDED IN RECORD ON APPEAL.

To the Clerk of the Above Entitled Court; to the Plaintiff and Appellant, Monarch Brewing Company, and to its Attorneys, Alfred F. MacDonald, Esquire, and Messrs. Bodkin, Breslin & Luddy:

Appellee, George J. Meyer Manufacturing Company, the defendant in the above entitled action, hereby designates the following portions of the record to be included in the Record on Appeal in said action, in addition to the portions of the record specified in "Designation Of Portion Of Record Desired By Plaintiff On Appeal," dated January 14, 1942, and filed herein by plaintiff and appellant on or about January 19, 1942: [106]

1. Plaintiff's original complaint.
2. Defendant's motion to dismiss.
3. The order of the Court granting the aforementioned motion to dismiss.
4. Copies of the two written contracts between plaintiff and defendant dated respectively February 14, 1938, and December 6, 1938, which copies were received in evidence at the hearing on September 29, 1941, of defendant's motion for summary judgment.
5. The order of the Court granting defendant's motion for summary judgment.

6. That portion of the Civil Docket in this action showing entry on October 8, 1941, of the said order of the Court granting the defendant's motion for summary judgment.

7. This application.

Dated this 20th day of January, 1942.

LAWLER, FELIX & HALL,
MAX FELIX,

WILLIAM T. COFFIN,

By WILLIAM T. COFFIN,

Attorneys for defendant and
appellee, George J. Meyer
Manufacturing Company.

[Endorsed]: Received copy of the *with* Designation this 20th day of January 1942. Alfred F. MacDonald and Bodkin, Breslin & Luddy, by H. Talbot Attorney for plaintiff and appellant. Filed Jan. 20, 1942. [107]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, R. S. Zimmerman, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 111 inclusive contain full, true and correct copies of: Complaint; Petition for Removal; Bond on Removal; Order of Removal; Certificate of Clerk to Record of Superior Court; Motion to Dismiss and for More Definite

Statement and for Bill of Particulars; Order Granting Motion to Dismiss; Amended Complaint; Answer to Amended Complaint; Motion of Defendant for Summary Judgment; Order Granting Motion for Summary Judgment; Memorandum Decision; Docket Entry of Judgment; Judgment on Plaintiff's Claims; Notice of Appeal; Bond for Costs on Appeal; Statement of Points; Appellant's Designation of Record on Appeal; Appellee's Designation of Additional Record; and Three Copies of Contract Admitted in Evidence, which constitute the record on appeal to the Circuit Court of Appeals for the Ninth Circuit.

I further certify that the fees of the clerk for comparing, correcting and certifying the foregoing record amount to \$15.65, which amount has been paid to me by the Appellant.

Witness my hand and the seal of the said District Court this 16th day of February, A. D. 1942.

(Seal)

R. S. ZIMMERMAN,

Clerk,

By EDMUND L. SMITH,

Deputy.

[Endorsed]: No. 10056. United States Circuit Court of Appeals for the Ninth Circuit. Monarch Brewing Company, a corporation, Appellant, vs. George J. Meyer Manufacturing Company, a corporation, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed February 18, 1942.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit
Circuit No.

No. 10056

MONARCH BREWING COMPANY, a corpora-
tion,

Plaintiff and Appellant,

vs.

GEORGE J. MEYER MANUFACTURING
COMPANY, a corporation,
Defendant and Appellee.

STATEMENT OF POINTS RELIED UPON
AND DESIGNATION OF RECORD ON AP-
PEAL REQUIRED BY RULE 19-(6) OF
RULES OF CIRCUIT COURT OF AP-
PEALS.

Comes now plaintiff and appellant Monarch Brewing Company and for statement of points relied upon upon appeal refers to and adopts the "Statement of Points Relied Upon By Plaintiff On Appeal", heretofore filed in this case by plaintiff in the United States District Court, Southern District of California, Central Division, and for designation of record on appeal refers to and adopts the "Designation of Portion of Record Desired by Plaintiff on Appeal", heretofore filed in this case by plaintiff, in the United States District Court, Southern District of California, Central Division,

and considers all of the items mentioned in said designation as necessary for the consideration of this appeal.

Dated: February 14, 1942.

ALFRED E. MacDONALD

BODKIN, BRESLIN & LUDDY

By G. STUART SILLIMAN

Attorneys for Plaintiff and
Appellant

Received copy of the within this 16th day of February, 1942.

LAWLER, FELIX & HALL

Attorneys for Plaintiff

[Endorsed]: Filed Feb. 18, 1942. Paul P.
O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

APPELLEE'S DESIGNATION OF ADDI-
TIONAL PORTIONS OF RECORD
DEEMED MATERIAL TO CONSIDERA-
TION OF APPEAL.

To the Clerk of the Above Entitled Court, to Plain-
tiff and Appellant, Monarch Brewing Company,
and to its Attorneys, Alfred F. MacDonald, Es-
quire, and Messrs. Bodkin, Breslin & Luddy:

Defendant and appellee, George J. Meyer Manu-
facturing Company hereby designates the following
portions of the record, deemed by appellee to be

material to the consideration of the appeal herein, in addition to the portions of the record designated in the "Statement Of Points Relied Upon And Designation Of Record On Appeal Required By Rule 19-(6) Of Rules Of Circuit Court Of Appeals" dated February 14, 1942, and filed herein by plaintiff and appellant, Monarch Brewing Company, on or about February 18, 1942:

1. Plaintiff's original complaint.
2. Defendant's motion to dismiss.
3. The order of the District Court granting the aforesaid motion to dismiss.
4. Copies of the two written contracts between plaintiff and defendant dated respectively February 14, 1938 and December 6, 1938, which copies were received in evidence at the hearing before the District Court on September 29, 1941, of defendant's motion for summary judgment.
5. The order of the District Court granting defendant's motion for summary judgment.
6. That portion of the Civil Docket in the District Court pertaining to this action showing the entry on October 8, 1941, of the said order of the District Court granting defendant's motion for summary judgment.
7. Appellee's Designation Of Additional Portions Of Record To Be Included In Record On Appeal filed by appellee in the District Court January 20, 1942.
8. The aforesaid "Statement Of Points Relied Upon And Designation Of Record On Appeal Re-

quired By Rule 19-(6) Of Rules Of Circuit Court Of Appeals'', dated February 14, 1942, and filed herein by plaintiff and appellant on or about February 18, 1942.

9. This designation.

Dated this 20th day of February, 1942.

LAWLER, FELIX & HALL,
OSCAR LAWLER,
MAX FELIX,
WILLIAM T. COFFIN,
By WILLIAM T. COFFIN

Attorneys for defendant and
appellee, George J. Meyer
Manufacturing Company.

Received two copies of the within Designation this 20th day of February, 1942.

ALFRED E. MacDONALD, BODKIN,
BRESLIN & LUDDY
By G. STUART SILLIMAN

Attorneys for Plaintiff and Appellant.

[Endorsed]: Filed Feb. 21, 1942. Paul P. O'Brien, Clerk.

